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# SCHOLARLY PERSPECTIVES

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# LAWYERING FOR MARRIAGE EQUALITY

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## INTRODUCTION

The movement to achieve marriage equality for same-sex couples has been called “the last great civil rights struggle.”<sup>1</sup> The analogy to the civil rights movement for racial equality in the 1950s and 1960s is deliberately asserted by activists and, in some respects, quite apt. Both groups comprise a minority of the population in the United States and have been subject to systematic discrimination. And, crucially, both have turned to courts to protect rights thwarted by majoritarian political institutions. As one result of civil rights litigation, there is a close legal precedent for marriage equality activists: *Loving v. Virginia*, the 1967 U.S. Supreme Court decision that overturned prohibitions on interracial marriage.<sup>2</sup> But beyond *Loving*, the two movements have shared a deeper history in which lawyers have been important leaders and litigation has loomed large as a strategy for policy reform. Much like the iconic role played by the NAACP Legal Defense and Educational Fund, Inc. (LDF) in the movement for racial equality, lawyers from elite public interest organizations—Lambda Legal, the ACLU Lesbian Gay Bisexual & Transgender (LGBT) Project, the National Center for Lesbian Rights (NCLR), and Gay & Lesbian Advocates & Defenders (GLAD)—have been pivotal in shaping the path toward marriage equality.

Critics of the civil rights analogy are quick to point out the historical, political, and legal differences between the marriage equality and civil rights movements, summed up in the wry phrase “gay is *not* the new black.”<sup>3</sup> Yet the pull of the civil rights framework is strong, not just as a way of legitimizing the marriage equality movement’s use of litigation, but also as a way of judging it. For scholars of law and social change, the emergence of marriage equality as the seminal post-civil rights progressive legal reform movement has provided an opportunity to test the contemporary validity of theories based on the now-dated civil rights paradigm. The result has been a renewed—and vigorous—debate over the promise and perils of social change litigation, with the marriage equality movement at the center.

This debate has revolved around the explanatory power of the “backlash thesis”<sup>4</sup>—the proposition that litigation does more harm than good for social change movements by producing countermobilization that makes reform goals more difficult to achieve.<sup>5</sup> In general, the backlash account emphasizes the institutional role of courts and the political reaction that their decisions produce: Courts establish new rights ahead of public opinion, political opponents mobilize to undercut the new

rights, and the movement suffers. Although the backlash story omits the motivations and decisionmaking processes of the lawyers who bring social change cases—as well as the differences among the lawyers involved across cases—it is presented as an indictment of their efforts. Specifically, Gerald Rosenberg concludes that same-sex marriage “proponents,” “succumbing to the ‘lure of litigation,’”<sup>6</sup> “confused a judicial pronouncement of rights with the attainment of those rights. The battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases.”<sup>7</sup>

Yet, to be defensible, such an indictment must be able to prove the empirical validity of a set of underlying assumptions about why litigation is brought in the first instance, what the alternatives to litigation are, and what would have occurred in the absence of litigation. In particular, in order for the backlash thesis to work as a critique of movement lawyer strategy, we should be able to look back at the historical record and find that three premises hold: (1) movement lawyers defined the legal right for same-sex couples to marry as a unitary goal *ex ante* and launched an impact litigation campaign to advance it; (2) litigation was the lawyers’ preferred, if not only, strategy; and (3) the litigation itself was the cause of political backlash resulting in negative movement outcomes, which would have been avoided by staying out of court and pursuing a political strategy.<sup>8</sup>

Our aim, therefore, is to analyze the power of the backlash thesis—and particularly its assignment of movement lawyer culpability—through close study of the marriage equality movement in California. Our general claim is that, while California has indeed experienced a backlash against same-sex marriage culminating in a constitutional ban, the reasons for backlash have less to do with deficient legal strategy and judicial overreaching than the unpredictability of events and the implacability of opposition to marriage for same-sex couples. More specifically, our review of the record of same-sex marriage in California shows that the premises of the backlash thesis do not accurately describe the way that movement lawyers conceived and implemented their advocacy campaign.

Our analysis leads us not only to challenge the validity of backlash in the California case, but also to question more broadly the scholarly emphasis on litigation as the *sine qua non* of social change lawyering. We do not reject litigation as a social change tool—to the contrary, we view it as an essential component of what we call “multidimensional advocacy,” defined as advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education). We draw a key lesson from the California marriage equality campaign: Efforts to isolate court-centered strategies from the broader advocacy context in order to fit litigation into the standard binary framework—is litigation good or bad?—are artificial and antiquated. Though the singular focus on litigation may have been warranted in an earlier era, the relevant question now for appraising social change lawyering

is: How does litigation relate to the range of other strategies that lawyers deploy to advance reform goals?

In contrast to the backlash account, LGBT movement lawyers in California prioritized a nonlitigation strategy, and conceptualized litigation as a tactic that succeeds only when it works in conjunction with other techniques—specifically, legislative advocacy and public education. Accordingly, lawyers constructed a legislative record that would further eventual litigation efforts at the same time that they pursued litigation that aided their legislative agenda and public education efforts.

Beginning in the mid-1990s, lawyers affirmatively decided to forego litigation because they were not confident that the California Supreme Court would support a marriage equality claim, and they were even more worried about the ease with which a favorable decision could be reversed through the initiative process. There was recurrent pressure on this “no-litigation” position. California Senator Pete Knight’s initial effort to pass a marriage ban through the legislature (in a bill called AB 1982) motivated some activists to press for litigation, but his early failure strengthened advocates’ arguments to stand down. The passage of Proposition 22, which codified a statutory prohibition against same-sex marriage in the California Family Code, presented another moment when lawyers had to resist community pressure to litigate to reverse the regressive law. Then, after the 1999 Vermont Supreme Court decision in *Baker v. State*,<sup>9</sup> which declared that same-sex couples were entitled to the rights and benefits of marriage (ultimately leading to the nation’s first civil union law), and the filing of a state constitutional challenge to marriage restrictions in Massachusetts (*Goodridge v. Department of Public Health*),<sup>10</sup> movement lawyers had to reiterate their opposition to a California constitutional challenge. This occurred at the 2003 UCLA California Marriage Litigation Roundtable, an invitation-only event of legal scholars and movement lawyers designed to “have a state-wide discussion about whether same-sex marriage litigation, similar to the cases brought in other states such as Vermont and New Jersey, should be brought in California.” The answer, they determined, was a definite no. In particular, the participants concluded that although it might be possible to prevail on the merits in the California Supreme Court, it would be too difficult to defeat a subsequent initiative, which was certain to occur, because public opinion was not yet on the side of marriage for same-sex couples. Finally, the same “no-litigation” message was conveyed both before and after Proposition 8 in a joint statement issued by movement lawyers, entitled “Make Change, Not Lawsuits,” in which they argued that “[t]he fastest way to win the freedom to marry throughout America is by getting marriage through state courts . . . and state legislatures . . . . But one thing couples shouldn’t do is just sue the federal government.”<sup>11</sup>

## I. ANALYSIS: THE LIMITS OF BACKLASH

### A. Multidimensional Advocacy

#### 1. Legislation to Enhance Litigation

Instead of pursuing a high-risk litigation strategy, movement lawyers focused on incremental legislative change. The lead legislative advocate, Equality California's Executive Director, Geoff Kors, is a trained litigator who had transitioned into a policy position. His appreciation for the role of litigation, combined with his political savvy, produced a sophisticated campaign to take domestic partnership in California from a regime of minimal rights to one including substantially all the state-based rights and benefits of marriage. Kors worked closely with movement lawyers—particularly the ACLU's Matt Coles, Lambda Legal's Jenny Pizer and John Davidson, and NCLR's Shannon Minter and Kate Kendell—who were involved in the drafting phase of domestic partnership and marriage legislation and in broader discussions about how best to secure and defend legislative gains.

Movement lawyers pursued a legislative strategy mindful of the prospect of future marriage litigation, carefully creating a record that would aid such litigation when it occurred. There were two facets to this strategy. First, in the context of domestic partnership, lawyers made sure that the legislative record supported the potential legal arguments that the state did not have any legitimate interests in withholding marriage from same-sex couples, and that such a denial was based on animus. In helping to draft the legislative findings for California's comprehensive domestic partnership law (known as AB 205), movement lawyers emphasized the prevalence of discrimination against same-sex couples while affirming the legitimacy and value of same-sex-couple-headed families. They also clearly (and deliberately) demonstrated that domestic partnership remained an institution separate from, and inferior to, marriage. This put movement lawyers in a strong position during the subsequent constitutional challenge to California's marriage law (*In re Marriage Cases*<sup>12</sup>), allowing them to argue that domestic partnership was separate and unequal, but that full-blown marriage for same-sex couples was, in a sense, only a small—albeit crucially important—step for the courts to take.

The second facet to the legislative strategy—advancing a state law marriage bill—was ultimately unsuccessful, but also showed how lawyers viewed the interplay between legislation and litigation. In the wake of the 2004 decision by San Francisco Mayor Gavin Newsom to issue marriage licenses to same-sex couples, it became clear to movement lawyers that it would be valuable to have married same-sex couples in California in order to show that “the sky didn't fall.”<sup>13</sup> This would be helpful in making the constitutional case that there was no harm in same-sex marriage and thus any exclusion based on sexual orientation was irrational. However, when the California Supreme Court nullified the four thousand San Francisco marriages in *Lockyer v. City and County of San Francisco*,<sup>14</sup> that strategy was upended. In response, advocates legislatively advanced a marriage bill in 2005 in order to achieve the right to marry—which was an end in itself—and to produce marriages in the lead-up to the court's resolution of the constitutional merits. The bill was ultimately vetoed and thus the marriages were not achieved through that

means. Nonetheless, the pursuit of the bill was still helpful to the broader advocacy campaign and reinforced the movement lawyers' effort to move forward on multiple tactical fronts. In particular, the fact that the marriage bill had won majority support in the legislature allowed the movement lawyers to argue to the California Supreme Court that marriage was consistent with the state's interests.

LGBT rights lawyers also litigated with a keen eye to how it might advance their legislative agenda. Toward this end, the lawyers engaged in strategic litigation relating to nonmarital relationship recognition, asserting relatively modest legal claims that produced compelling human interest stories that could be mobilized to move the legislative process. The strategy was to present a "wrenching story, with powerful evidence, in which the legal step was relatively small."<sup>15</sup> One example was the case of Keith Bradkowski, whose registered domestic partner was a flight attendant on the first American Airlines flight to crash into the World Trade Center on September 11. Lambda Legal's Pizer represented Bradkowski in his difficult effort to receive money from victim compensation funds. Bradkowski's powerful testimony in front of the California legislature was credited with helping ensure the passage of AB 2216 in 2002, which provided domestic partners with inheritance rights.<sup>16</sup> This case and others like it increased the salience of the issue of LGBT family recognition by replacing abstract legal concepts with powerful stories of real human suffering. These stories, in turn, served the movement's legislative agenda as advocates relied on them in seeking additional rights from the legislature.

## 2. Litigation to Enhance Legislation

Movement lawyers also used litigation to protect legislative gains. Most significantly, when countermovement forces sued to invalidate comprehensive domestic partnership based on Proposition 22, movement lawyers successfully protected their legislative achievement through litigation. Defending a legislatively enacted, nonmarital relationship-recognition law produced less publicity and presented less risk than affirmative marriage litigation since the lawyers were not asking the courts to affirmatively declare relationship rights, but rather to defer to the results of representative democracy.

## 3. Litigation as a Legislative Shield

Litigation and legislative advocacy were also used to advance the movement's public education aims, which were geared toward ensuring sufficient public support to withstand a voter initiative to ban marriage for same-sex couples. Key to this project was the effort by movement lawyers to protect the validity of the four thousand San Francisco marriages after the Newsom decision in 2004. NCLR's Kendell, for instance, sought to harness the powerful images of same-sex couples rushing to get

## 4. Public Education

married: “I was confident at the time that people seeing couples night after night joyous with their families, kids, and parents in tow standing in the rain just to get a marriage license was going to be transformative.”<sup>17</sup>

#### 5. Beyond (But Not Without) Litigation

Overall, the LGBT rights lawyers’ approach in California—generally avoiding affirmative litigation, cultivating litigation’s indirect effects, and understanding litigation in relation to other institutional domains—shows that the backlash account’s stereotyped vision of the naïve rights-crusading public interest lawyer is inaccurate. LGBT rights lawyers in California appreciated the relationship between litigation and non-litigation strategies and made decisions based on how to maximize overall success. They understood that court-centered disputes constitute one of the many ways in which ongoing social conflicts play out. Accordingly, they did not look to courts as saviors, but rather saw them as just one of the many players in the marriage equality movement. Similarly, they viewed litigation as just one tactic in their repertoire, seizing upon the dynamic relationship among courts, other governmental branches, elites, and the public.

There are two important implications of these findings. First, the California marriage equality case suggests that the single-minded scholarly focus on litigation as *the* social reform vehicle is outmoded. Contemporary legal advocacy in the marriage context does not fit the top-down, litigation-centric framework developed to address the civil rights movement of the mid-twentieth century. This finding should make us rethink the appropriateness of the conventional emphasis on litigation in other advocacy contexts and investigate the degree to which the multidimensional model of advocacy deployed in the marriage equality movement applies across different substantive domains. To the extent that lawyering in other fields embraces multidimensionality, it should reinforce the rejection of theories that focus exclusively on litigation in favor of a more nuanced scholarly approach.

However—and this is the second point—it is important to emphasize that moving beyond the focus on litigation is not to diminish its importance as a movement strategy. It is true that LGBT rights lawyers in the California case sought to avoid marriage litigation and resorted to it only by necessity. But that is not to suggest that litigation is “bad” and legislative advocacy and other strategies are necessarily “good.” To so conclude would simply reproduce the critique of litigation. Rather, the lesson to draw from the California case is that litigation is an essential, albeit partial, tactic in social change struggle. It may well be of limited efficacy by itself, but when strategically deployed in tandem with organizing, political advocacy, and public education campaigns, it is an important tool. When LGBT rights lawyers believed that they could use litigation to advance the cause—for instance, by defending AB 205 or filing what would become *In re Marriage Cases* in response to the California Supreme Court’s invitation for a constitutional challenge—they did so with skill and

success. And, as the affirmative litigation in Vermont and Massachusetts highlights, it was not simply that movement lawyers disdained litigation, but instead that they held a well-researched view that *in the California context* it would produce negative movement results if used prematurely.

The backlash thesis presumes that there is a clear causal relationship between court decisions and political outcomes. Within this model, the court decision is the “but for” cause of countermobilization: It is court action against public sentiment that ignites opposition, which succeeds in enacting regressive policy. The argument thus rests on a notion of “judicial exceptionalism”—that the unique countermajoritarian nature of court decisions produces backlash where other forms of lawmaking, such as legislation, would not.

Yet, in California, the evidence in support of this causal relationship is thin. It is instructive to look at the two anti-same-sex marriage statewide initiatives: Proposition 22, which banned marriage for same-sex couples by statute in 2000, and Proposition 8, which banned it by constitutional amendment in 2008. In the case of Proposition 22, the causal relationship is fuzzy. From the backlash perspective, the strongest argument would be that the *Baehr v. Lewin* decision in Hawaii<sup>18</sup>—which ruled that the state’s marriage restrictions discriminated based on sex and thus warranted strict scrutiny analysis—caused political reverberations in California, where opponents worried that Hawaii marriages would have to be recognized. This motivated Senator Knight to advance AB 1982 in 1996, which was defeated, and then to resurrect the statutory ban in Proposition 22, which was approved for the statewide ballot in 1998. The Vermont Supreme Court decision in December 1999 added fuel to the fire and helped mobilize marriage equality opponents to pass Proposition 22 by a convincing margin in March 2000.

However, it is not clear that this was the actual causal chain. By the time Proposition 22 qualified for the ballot, Hawaii had passed its constitutional amendment permitting the legislature to prohibit marriage by same-sex couples (which it had already decided to do), thus withdrawing the threat of forced recognition of out-of-state marriages. Vermont’s *Baker v. State*<sup>19</sup> decision may have provided additional impetus, but by the time California voters went to the polls in 2000, it was clear that Vermont was heading toward civil unions, not marriage, for same-sex couples. Moreover, part of the motivation for Proposition 22 appeared to be the legislative efforts to establish domestic partnership, particularly the 1999 passage of California’s domestic partner registry, which opponents viewed as a step toward marriage. Indeed, once comprehensive domestic partnership was passed in 2003, opponents attempted to negate it by arguing that it contravened Proposition 22.

In the Proposition 8 context, the causal chain is even more attenuated. There are two separate court linkages. The first runs from *Goodridge v. Department of*

## B. Backlash Mechanics and the Causation Problem

### 1. Judicial Exceptionalism?

*Public Health*<sup>20</sup> to the *Marriage Cases*; the second from the *Marriage Cases* to Proposition 8. There is reason to be dubious of both. With respect to the first, the argument would be that *Goodridge* provoked Mayor Newsom's issuance of marriage licenses to same-sex couples in San Francisco,<sup>21</sup> and that this decision, in turn, provoked the Alliance Defense Fund (ADF), a Christian Right legal organization, to initiate litigation that ultimately ended up squarely presenting the constitutional challenge against California's statutory marriage ban. Yet, if the causal chain is supposed to run from the court decision to public opposition, one must strain to fit the *Goodridge* link into that framework. In fact, the Newsom decision, rather than represent public opposition, was just the opposite: an expression of elite political support for *Goodridge* and an attempt to extend its reach. Tracing a line from Newsom's action to the California Supreme Court decision also fails to neatly follow the backlash story, since the court decision is the result of countermobilization (ADF filed the injunction action that led to the *Marriage Cases* decision), not its cause.

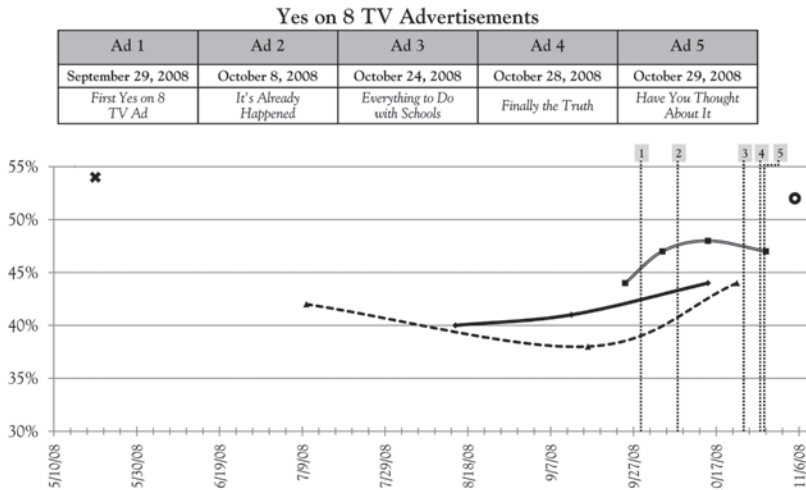
Even if we take the California Supreme Court decision on its own terms, it is not at all clear that it caused Proposition 8 in any meaningful sense. It is the case that Christian Right advocates seized on the supreme court oral arguments to mobilize constituents and raise funds to place Proposition 8 on the ballot.<sup>22</sup> However, the picture is complicated. These same countermovement advocates were organizing the Proposition 8 effort before marriage equality litigation had commenced.<sup>23</sup>

Furthermore, if it were true that there was something unique about court decisions that caused backlash, we would expect public support for Proposition 8 to increase precisely because it was the California Supreme Court that affirmed the legality of marriage for same-sex couples. However, the public opinion data on Proposition 8, at best, only support a more limited claim: that the countermajoritarian nature of the judiciary was one factor among many that influenced public opposition.<sup>24</sup> And there is reason to suspect that the judicial origin of the marriage equality law was less important than other factors, namely the specter that schools would be compelled to teach about homosexuality and same-sex relationships.

One way to evaluate the influence of the court decision on public opinion is to look at how it was used by the Yes on 8 campaign in its messaging. Although the Yes on 8 campaign used multiple venues to get its message out, including online videos and "viral" emails, we focus on television advertising, on which the campaign invested heavily during the two months leading up to the vote. Figure 1 tracks the three major public opinion polls leading up to Proposition 8 and indicates the first air date for the five major Yes on 8 television advertisements.

FIGURE 1: PERCENT IN SUPPORT OF CALIFORNIA PROPOSITION 8

-- Field Poll    — Survey USA    — Public Policy Institute of California    \* LA Times    ● Prop. 8 Vote



As Figure 1 shows, there was only one poll in the immediate wake of the May 15, 2008 *Marriage Cases* decision, by the *Los Angeles Times*; it did not ask specifically about Proposition 8 (which had not yet been named), but rather asked if the respondent would vote in favor of a proposed amendment that would “reverse the court’s decision and state that marriage is only between a man and a woman,” to which 54 percent answered yes.<sup>25</sup> By July, three separate polls—the Field Poll, Survey USA, and the Public Policy Institute of California poll—started tracking support for Proposition 8. In the first of these, the July Field Poll, support for Proposition 8 was at a relatively low 42 percent, suggesting that the impact of the court decision on public opposition to marriage equality softened as the immediacy of the decision faded. Support for Proposition 8 began to increase in September and generally continued to trend up as the election drew near.<sup>26</sup>

This period of increased support for Proposition 8 corresponded to the Yes on 8 television advertising campaign, leading commentators to suggest that the ads had an important impact on public opinion.<sup>27</sup> The Yes on 8 proponents mobilized several arguments to make their public case. At the outset of the television campaign, the supreme court decision played a clear—though partial—role. The first ad, which began airing on September 29, 2008, depicted a grinning Gavin Newsom uttering the phrase, “It’s gonna happen, whether you like it or not!,” and explicitly emphasized the anticourt theme (“Four judges ignored four million voters and imposed same-sex marriage on California.”).<sup>28</sup> This ad, however, did not simply rest on the “activist court” theme, but also raised two other arguments: that marriage equality would undermine the free exercise of religion (“churches could lose

their tax exemption”) and affect public school programming (“gay marriage taught in public schools”).<sup>29</sup> It is not possible to say which argument had the most public impact, but the Yes on 8 campaign’s choice of which ads to air next is suggestive of the arguments it believed had the most traction. The next three ads (It’s Already Happened, October 8; Everything to Do With Schools, October 24; and Finally the Truth, October 28) did not mention the court decision and instead focused exclusively on the impact of Proposition 8 on school programming, all suggesting that its defeat would mean that “gay marriage” would be taught in schools and that parents would have no legal right to remove their children from such instruction.<sup>30</sup> The final ad of the campaign, “Have You Thought About It?,” began airing on October 29, and returned to the trio of arguments (religious freedom, the activist court, and schools) that were raised in the first ad a month earlier. Whereas polling put support for Proposition 8 at between 38 and 44 percent when the Yes on 8 ads began to air, by the time of the election on November 5, 2008, Proposition 8 passed with 52 percent of the vote.

What does this tell us? Consistent with the backlash account, Yes on 8 proponents mobilized the court decision in their ad campaign, suggesting that it struck a public chord. However, the strong backlash claim—that the court decision *caused* the bad outcome—is unsupported. The activist court theme was never presented in the television ads as a stand-alone reason to vote for Proposition 8. And during the crucial month before the vote, the three successive ads aired by the Yes on 8 campaign focused exclusively on schools, suggesting they were having the most impact—a conclusion supported by exit polling showing that parents with school-age children voted for Proposition 8 in disproportionately high numbers.<sup>31</sup> Of course, we do not know whether in a close vote those motivated by anger toward the “activist court” tipped the scales. However, the focus of the ads in the final stage of the campaign suggests that Proposition 8 proponents did not believe that the “activist court” message was their strongest closing argument.

Even if the court decision was related to the passage of Proposition 8, the backlash thesis only stands up as a critique of courts if it can prove the counterfactual: that the same events would not have transpired if Governor Schwarzenegger had signed the legislature’s marriage bill and there had been no court decision. This counterfactual, of course, cannot be proved. But there is reason to suspect that a marriage bill, passed by the legislature and signed by the governor, would have produced a similar backlash effect. It is clear that if marriage passed through the legislature, opponents would have sought to reverse it via the initiative process and were already attempting to place the issue on the 2006 ballot.<sup>32</sup> As California Senator Mark Leno was preparing to introduce the marriage bill in 2005, an ADF attorney predicted that if either the courts or the legislature established the legal right for same-sex couples to marry, the voters would reverse it. Likewise, Randy Thomasson of the Campaign for California Families stated that passage of a mar-

riage equality bill by the legislature “will ignite the majority of California” to vote for a constitutional amendment to “override the politicians.”<sup>33</sup> Thus, opponents were mobilized to place a constitutional ban on the ballot irrespective of the form in which marriage equality was passed. And one could imagine that had the bill been enacted against the backdrop of Proposition 22, there would have been a similarly harsh media campaign: “the unaccountable bureaucrats in Sacramento, captured by pro-gay special interests, have thwarted the will of the people . . . .”

Then, the question becomes: Would voters have been less likely to overturn a marriage bill enacted by the legislature? While this question is impossible to answer with certainty, there is at least circumstantial evidence suggesting that a marriage bill would have fared no better than the court’s decision in front of the voters. This evidence emerges from recent events in Maine, where the legislature—in the absence of any court decision—passed a marriage equality bill, which the governor signed. However, voters reversed the decision in November 2009.<sup>34</sup> The campaign to overturn the law relied on the same playbook developed during California’s Proposition 8 campaign.<sup>35</sup> The same advertisements linking marriage equality to gay-inclusive school curricula distracted voters from the core of the issue and stoked the fears of parents.<sup>36</sup> And instead of pointing to a “handful of judges,” the campaign for voter repeal argued that a “handful of politicians cannot be the only ones to decide what the definition of marriage should mean for the entire state of Maine.”<sup>37</sup> In the end, voters in both California and Maine narrowly overturned the legalization of marriage for same-sex couples, and the different institutional postures of the initial legalization did not determine the ultimate outcomes.

How do we measure the success of litigation campaigns? Rosenberg assesses the effectiveness of LGBT rights advocacy by focusing on the ultimate end goal: marriage.<sup>38</sup> Thomas Keck, in his analysis of LGBT rights, focuses on the starting point—the absence of legal status for same-sex unions—and compares this to the rising number of state-based relationship recognition laws, including both marital and nonmarital regimes.<sup>39</sup> If we measure success in relation to the goal of establishing a right for same-sex couples to marry, the gulf between aspirations and reality may seem large. But if instead we base success on how far from the starting point the movement has come, the progress appears quite impressive.

The same issue of baseline affects our analysis of California. Judging by the metric of full marriage equality, the movement in California has come up short and, in a real sense, must now surmount a difficult new hurdle in repealing Proposition 8. However, measuring success relative to the starting point of nonrecognition paints a different picture. Whereas same-sex couples had no statewide legal rights in early 1999, by the end of 2009, they had won comprehensive domestic partnership and, in addition, full legal recognition for in-state and out-of-state marriages performed

## 2. Baselines and Metrics

prior to Proposition 8 and full recognition (without the label “marriage”) for out-of-state marriages entered after Proposition 8 (per SB 54). California thus went from having no legally recognized same-sex unions in 1999 to having over forty-eight thousand registered domestic partners by 2008,<sup>40</sup> eighteen thousand same-sex couples legally married inside California prior to Proposition 8, an unknown (but possibly significant) number of pre-Proposition 8 legally recognized out-of-state marriages, and an unknown, but growing, number of same-sex couples married out-of-state after Proposition 8, who are entitled to full legal status in California, albeit without the marriage label.

While the ultimate appraisal of the movement’s “success” or “failure” may depend on one’s vantage point, our own view is that this record demonstrates substantial progress measured relative to the starting point of no rights. It is also relevant to note that through the eyes of those most keenly attuned to the marriage equality movement in California—the lawyers themselves—the picture is far from the grim portrait depicted by backlash proponents. To the contrary, the lawyers view their accomplishments in both creating domestic partnership and creating limited marital recognition as major advances. Even after the passage of Proposition 8, movement lawyers generally remain positive about what they have accomplished—and optimistic about what lies ahead. Minter, the lead lawyer for the LGBT rights groups in the *Marriage Cases*, put it this way: “[L]ook at where we are. Things have moved forward more quickly and dramatically than anyone would have dreamed. We are so much further along now than where we were in 2004.”<sup>41</sup>

**CONCLUSION:  
MOVEMENT  
LAWYERING—  
IN THE FACE OF  
BACKLASH**

**I**n the urge to understand and appraise the complex forces that have driven the marriage equality movement, it is easy to overlook the elemental heroism that has defined the work of lawyers and activists who—in the face of implacable opposition and virulent hostility—have moved marriage from the margins to the mainstream in California. Working for relatively little pay and recognition, they asserted the right to be treated equally and fought for its realization. That they have not fully succeeded in achieving it speaks more to the power and perseverance of their opponents than to their own sophistication and tenacity. What we are to make of their efforts is a question that will continue to be vigorously debated. In California, though marriage equality has not yet been achieved, the legal landscape for same-sex couples has been transformed over the past decade, from a regime of no rights to one of equality in all but name, with a significant number of intact marriages of same-sex couples. Although the future is still uncertain, an analysis that obscures these gains offers an incomplete picture of the marriage equality movement that diminishes advocates’ efforts and presents a false accounting of what has been won and lost—so far.

The story of the national marriage equality movement is still being written, which means that an overall appraisal cannot yet be fully completed. What we do know is that the echoes of California activism continue to reverberate in legislatures and courts around the country, as advocates continue to pursue a state-by-state strategy (while closely watching *Perry v. Schwarzenegger*,<sup>42</sup> the federal constitutional challenge to Proposition 8 that advocates discouraged). These multiple and contested efforts underscore the central lessons from our analysis of the California case. Advocacy around marriage equality is multidimensional, contextual, and unpredictable. Litigation plays an important, but not decisive, strategic role: It is part of an overall arsenal that includes legislative advocacy and public education, and it is always undertaken in the context of a careful analysis of the likely political consequences and how they might be addressed. Opposition is constant and sophisticated, so that there is never a clear “win,” only moves that are certain to be countered. In this sense, the model of lawyering in the marriage equality context is not one of avoiding backlash, but managing its inevitable onset by influencing its form and intensity.



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# NANOTECHNOLOGY REGULATION: A STUDY IN CLAIMS MAKING\*

Timothy F. Malloy\*\*

It is generally acknowledged that nanotechnology—the ability to measure and to control matter at the nanoscale level—is “disruptive,” meaning it is a radical innovation that fundamentally challenges the existing product/technology market and opens new competitive opportunities.<sup>1,2</sup> While such characterizations focus upon its impact on markets, this new technology is also disruptive in another way; it challenges risk governance in the United States, meaning the legal and institutional decision-making processes used in addressing risks facing society.<sup>3</sup> Nanotechnology raises substantial scientific and policy issues regarding both risk assessment and standard setting, provoking calls for further study and “soft law” approaches relying upon voluntary action by industry rather than mandatory regulation.<sup>4,6</sup> Other commentators, some invoking the precautionary principle, advocate immediate prohibition of or substantial limits on nanotechnology under existing or new law.<sup>7, 8</sup>

Yet even as the debate over whether and how to regulate goes on, rapid nanotechnology deployment in industrial, commercial, and consumer settings continues. The danger of this lag is illustrated by historical examples of potentially hazardous innovations that became entrenched in commerce, ultimately causing substantial adverse health impacts and environmental damage, even as regulators engaged in research, contemplation, and voluntary initiatives. Tetraethyl lead and methyl *tert*-butyl ether (MTBE) are just two classic examples, but there are many others.<sup>9</sup>

The governance challenge with respect to nanomaterials regulation is two-fold. First, regulatory policy must allow the development and deployment of this rapidly emerging technology while minimizing the negative public health and environmental impacts. Second, the difficulties inherent in balancing market innovation and environmental protection even with well-characterized chemicals and technologies are compounded here because the policy must operate under conditions of great uncertainty. There are a variety of potential policy tools for tackling this challenge, including conventional direct regulation, self-regulation, tort liability, financial guarantees, and more. The literature in this area is replete with proposals embracing one or more of these tools, typically using conventional regulation as a foil in which its inadequacy is presented as justification for a new proposed approach. At its core, the existing literature raises a critical question: What is the most effective role of government as regulator in these circumstances? This article explores that question by focusing upon

two policy approaches in particular: conventional regulation and self-regulation, often described as hard law and soft law, respectively.

Framing the  
Issues

Conventional direct regulation, or “command and control” regulation as it is typically (and often pejoratively) called, can generally be defined as “the issuance of prescriptive rules intended to directly control the behavior of private actors.”<sup>10</sup> As I discuss more fully later, the description of direct regulation found in the literature is often at odds with its actual structure and operation “on the ground.” In contrast, self-regulation and soft law generally refer to governance mechanisms that have no or limited legal force.<sup>11, 12</sup> There is a great deal of fuzziness regarding what actually counts as self-regulation or soft law,<sup>13, 14</sup> particularly in the nanomaterials policy literature. Most commentators would characterize industry codes of conduct such as Responsible Care as within the ambit of self-regulation.<sup>6, 11, 12</sup> They also include arrangements in which non-governmental third parties engage with industry in creating voluntary guidelines or decision frameworks as another extended form of self-regulation. The Environmental Defense–DuPont Nano Partnership Nano Risk Framework, essentially a recommended methodology for evaluating and addressing potential risks of nanoscale materials, is an example of this latter form.<sup>6</sup>

Lastly, some commentators also include “enforced self-regulation” within the scope of self-regulation, although here there is some significant ambiguity. As originally conceived by Ayres and Braithwaite in the classic book *Responsive Regulation*, enforced self-regulation was a form of “contractual” regulation in which an individual facility or industry group negotiated plant or industry sector-specific, legally enforceable rules with the regulator.<sup>15</sup> Some commentators in nanopolicy appear to take a more expansive view, suggesting that “enforced self-regulation” refers to *voluntary* programs in which industry and government actors jointly participate, such as the Environmental Protection Agency’s (EPA) ill-fated Nanoscale Materials Partnership Program.<sup>6, 16</sup>

In examining the often competing approaches of hard law and soft law, I focus on how commentators use particular narratives to frame the problem and the potential solutions.<sup>17</sup> The policy debate we see occurring now is not simply a rational, analytic enterprise. Sociologists and political scientists in particular have examined how social problems come to be defined and addressed in policy—be it legislative or administrative. In one leading thread of social problem theory, sociologists characterize policy debate (whether among academics in journals such as this one, in the popular media, or in a legislative or administrative forum) as a “claims-making process.” A claims maker develops narratives aimed at persuading their relevant audience (be it peers, the public, or policymakers) to embrace their definition of the problem and their identification and evaluation of the potential solutions.<sup>18, 19</sup>

Likewise, political scientists speak of policy entrepreneurs, individuals or organizations, more intent on advancing a particular policy than on objectively evaluating a range of options. In a complex environment in which streams of problems, policies, and politics swirl about, policy entrepreneurs seek to control the decision agenda and frame the problem definition so as to advance their favorite policy.<sup>20, 21</sup> Thus, the problem, its defined attributes, and the nature of the alternatives are constructions rather than objective facts as they are typically presented. They are supported by express and tacit assumptions and claims, both factual and normative. Exploring those assumptions and claims, challenging them, and considering alternative claims, can open up the policy discussion and lead to alternative constructions.

Such an analysis thus begins with problem definition. In the context of nanopolicy, most articles framed the problem definition as which governance approach, if any, is best suited to balance the potential health and environmental dangers of nanotechnology with its actual and potential social benefits. The articles tend to focus on a common set of problem attributes with associated consequences, as described in Table 1.

**Table 1**  
**Problem Attributes**

Problem Attribute	Consequences	Exemplar Articles
There is a lack of available methodologies and data regarding uses, hazards, and exposures regarding nanoparticles.	Absent these methodologies and data, conventional direct regulation is not feasible.	6, 22, 32
Government agencies have limited technical capacity, knowledge, and resources.	Governance mechanisms must rely upon the capacity, knowledge, and resources of business firms and third-party organizations.	11, 22, 34
Beneficial but potentially risky development and deployment of nanotechnology is proceeding rapidly.	Balanced implementation of governance mechanisms must occur with comparable speed.	6, 33, 35

Detailed analysis and discussion of each of these attributes and their ostensible consequences are beyond the scope of this paper. However, it is important to note that the attributes and related consequences themselves reflect certain underlying, often tacit assumptions about the nature of conventional regulation and the capacities of regulatory agencies. For example, identifying the lack of data about toxicology, metrics, and exposure routes (and the absence of methodologies for obtaining

that data in the near term) as an obstacle to direct regulation assumes that such regulation is heavily data-dependent and thus ineffective under conditions of uncertainty. As we shall see, the framing of the problem attributes and consequences also reflects certain assumptions about the incentives and capacities of business firms. The point here is that these attributes, consequences, and supporting assumptions tend to drive the narrative used by commentators to advance soft law approaches.

The soft law narrative responds to the problem attributes by asserting that business firms, with some support from non-governmental organizations and government, can most effectively balance the twin concerns of protection and innovation, at least in the near-to-medium term. Hard law approaches are cast as impractical, ineffective, and potentially detrimental to beneficial innovation in nanotechnology applications. This soft law narrative appears to be driven by two sets of claims embedded in the problem attributes and consequences. The first is that, even absent direct regulation, business firms have strong incentives and sufficient capacity to adopt safe practices in the use of nanotechnology in products and production processes.<sup>22, 23</sup> The second is that direct regulation is substantially hindered by its inherent structure and by the limited capacities of the implementing agencies.<sup>6</sup>

<sup>22</sup> Careful unpacking of those claims reveals that the foundations for the soft law approach are themselves a bit soft.

### Business Incentives and Capacities

With respect to the business narrative, I turn first to the incentives that shape business firm behavior. The literature generally relies upon three behavioral influences to support the notion that industry will effectively regulate itself: fear of tort liability, fear of technology stigma, and operation of the “good neighbor” norm.<sup>23, 24</sup> Take, for example, the fear of tort liability that a company may face when considering whether and how to incorporate a nanomaterial into a consumer product such as a toy, a tie, or a tire. Broadly speaking, should the consumer suffer harm as a result of exposure to that nanomaterial, the company may be liable for personal injuries and other damages under either a negligence standard or a strict liability standard. Negligence occurs where the company failed to act with “due care”; that is, the company did not meet the level of care one would expect from a reasonable person under the circumstances. Strict liability, on the other hand, does not directly depend upon the level of care exhibited by the manufacturer. Instead, it applies where a manufacturer sells a product that is unreasonably dangerous due either to a design or manufacturing defect or to inadequate warning of dangers associated with the product.<sup>25, 26</sup> These forms of tort liability serve a compensatory function; they attempt to make the injured party whole. In theory, they also serve a deterrent function; the threat of liability drives companies to adopt reasonable measures to reduce risks to consumers.<sup>27, 28</sup>

Fear of technology stigma focuses upon the public reaction to revealed hazards rather than technical legal liabilities. The story here is straightforward; if an accident or other incident involving nanomaterials in a consumer product or industrial process causes or even threatens substantial injury or damage, the resulting backlash could devastate not only the involved business, but the industry sector and perhaps even nanotechnology as a field. Salient examples include the impact of the Three Mile Island incident on the nuclear power industry, and of the Starlink incident on genetically modified foods.<sup>29, 30</sup> In some instances, the reaction will be rejection of the technology by the consumers or public more broadly; in other cases, the result may be onerous regulation.

Both fear of tort liability and fear of technology stigma relate primarily to the business firm's profit-making motive. The third behavioral influence—the “good neighbor” norms—relates to social values internalized by the firm as an institution, and by its managers and employees as individuals. By good neighbor norms I mean a number of social norms and personal values that may push members of business firms and the firms themselves to engage in “other-regarding” behavior. At the corporate level, this is reflected in the concept of corporate social responsibility, the notion that firms should—and in many cases actually do—engage in socially responsible behavior. In other words, firms attempt to “do the right thing.” While some researchers link such behavior to instrumental motives (*i.e.*, good behavior leads to higher profits), others attribute socially responsible behavior to ethical or normative drives embedded in firm culture.<sup>31</sup> At the individual level, other-regarding behavior such as altruism has been documented by sociologists, psychologists, anthropologists, and others, and can be observed in everyday interactions.<sup>36</sup> Most commentators attribute this behavior to the operation of social norms, although there is continued debate over whether such norms are externally enforced through non-legal social sanctions, self-enforced through feeling of guilt or shame, or rather fully internalized and thus essentially self-executing.<sup>37, 38</sup>

At the outset, we should recognize that these three incentives—liability, stigma, and norms—do appear to have some role in business firm decision making. No doubt firms spend money and other resources attempting to avoid product liability lawsuits and to avert public and government perceptions that a product or production process is harmful. With that said, however, there is ample evidence that these factors are only part of the story, and in many circumstances are more than overcome by other individual and organizational drives and limitations. In particular, these incentives can lose behavioral traction in three ways, through what I call rational slippage, routine slippage, and cognitive slippage.

Rational slippage occurs when the firm engages in a calculation of the economic risks and benefits of selling a potentially dangerous product, or using an unreasonably hazardous process. It can significantly weaken the impact of those incentives, such as fear of liability and fear of technology stigma, that play upon a

firm's self-interested profit motive. When the incentives are not properly aligned or structured, the profits from that activity may exceed the firm's perceived risk of loss. For example, in practice, substantial tort actions based upon environmental harms and emerging technologies are difficult to win.<sup>27, 39</sup> One formidable hurdle is that the injured party in a tort lawsuit must establish causation, a particularly complicated and multi-faceted element of the case. Typically, proving causation would require demonstrating both that a particular nanomaterial is capable of causing the disease in question (known as general causation) and that exposure to that material actually caused the injured party's disease in this case (specific causation). This is a difficult enough standard to meet in any situation; it can be insurmountable where there is a long lag between exposure and onset of disease, a likely scenario with nanomaterial exposures. This difficulty is also compounded by the relative paucity of data regarding nanomaterial uses, toxicity, and exposure pathways.<sup>27, 40</sup> It is further complicated by the so-called *Daubert* standard for the admissibility of scientific evidence regarding causation in tort cases, a high bar generally requiring that the proffered theory or technique have achieved general acceptance within the relevant scientific community.<sup>27, 40, 41</sup>

Rational slippage increases when one considers what economists call the "agency problem." A business firm is a useful fiction but, in reality, individual executives and managers are the actual decision makers, acting as agents for the firm. In theory, they should be making decisions that are in the best interests of the firm. In practice, their own immediate interest in maximizing salary, bonuses, and status often leads to decisions that enhance short-term performance of the business, while undermining the long-term success or even survival of the firm.<sup>42</sup> This phenomenon is particularly acute where the action in question gives rise to immediate corporate profit coupled with potentially devastating but long-delayed consequences, as in tort claims involving diseases with long latency periods.

All of this is not to say that potential tort liability has no influence upon business behavior. Clearly, it has some influence; one need only observe the prevalence of insurance markets and the existence of risk-management departments and professionals within business firms to recognize that firms respond to the tort regime in structuring their organizations and operations. But the central questions are how strong an influence tort liability is, and what behavior it spawns. For example, concern over tort liability could drive an organization to make safer products, just as proponents of soft regulation contend. Alternatively, the specter of liability may also lead to strategic defensive responses, such as the underproduction of information regarding hazards or the conscious squelching of safer but more costly alternatives so as to undermine the viability of potential future tort claims.<sup>28, 43</sup> When one takes into account the substantial legal and evidentiary hurdles facing the injured party, adds the high transactions costs associated with such lawsuits, and layers on top the likelihood of strategic behavior, "nano-tort" liability is not a particularly strong incentive for safe behavior.

Routine slippage focuses upon how the structural and organizational features of a business firm itself can undermine the effectiveness of incentives. Except for the very smallest of businesses, a company is a network of participants, with each performing assigned tasks in a coordinated effort to produce a product or service effectively and efficiently. Within that organizational network, resources such as funding and authority are allocated through a variety of internal rules, procedures, and practices. Likewise, the network participants are supplied with the information needed to perform their tasks through a variety of formal and informal communication channels.<sup>44</sup>

Whether a company is driven by profit maximization or social responsibility or both, the capacity of managers and staff to act in accordance with those goals is dependent upon their access to the necessary information, authority, and funding. For example, a product designer with a sincere desire to protect the consumer will not avoid a potentially hazardous component unless he is aware of that hazard and has the authority to alter the product specifications. Likewise, a trustworthy, economically rational executive will likely choose investment in an ostensibly cheaper, established production process over funding an apparently more expensive, safer alternative where the potential tort liability costs of the former have not been incorporated into the financial estimates. For a variety of reasons described in extensive literatures in law, sociology, economics, and business management, the flow of authority, funding, and information in many companies prevents optimal protection of public health and the environment.<sup>44</sup> This can be so even in those firms that, whether based on economic rationality or on other-regarding norms, are sincerely committed to reducing the impacts of their operations.

Cognitive slippage acknowledges humans' remarkable facility to "work around" even strongly held normative beliefs when it suits their self-interest. One such cognitive strategy is norm neutralization, in which the individual uses cognitive scripts to justify wayward behavior—a handy list of excuses for situations in which the relevant norm has been activated.<sup>45</sup> An example is the "metaphor of the ledger" script, in which the individual justifies an imminent norm violation by balancing it against a prior history of compliant behavior, characterizing him or herself as an essentially "good" person doing their best.<sup>46</sup> Defensive denial is another common cognitive strategy that works not by justifying an acknowledged norm violation, but rather by recharacterizing the situation so as to deny that the relevant norm is even applicable.<sup>47, 48</sup> For example, one empirical study demonstrated that when conserving energy would impose high personal costs on individuals, those individuals avoided the conservation norms by adjusting their perceptions of the seriousness of energy shortages or the harms flowing from current levels of energy use.<sup>47</sup>

The demonstrated effects of calculated, routine, and cognitive slippage thus undermine the soft law narrative's reliance on tort liability, technology stigma, and other-regarding norms as incentives for effective self-regulation. Yet even when such incentives do play a strong part in business decision making, there is good reason to question the capacity of businesses to engage in effective self-regulation. Recall

that as part of problem definition, the soft law literature tends to characterize businesses as agile innovators, responding efficiently to dynamic conditions. While that may be true for certain firms, business management researchers have identified the opposite effect in a variety of studies, concluding that many otherwise successful business organizations exhibit the inability to translate valuable new knowledge into effective action. This effect—called the performance paradox—is one manifestation of the wider phenomenon of organizational inertia, defined as the strong persistence of existing form and function.<sup>44, 49</sup> No doubt the strength of inertial forces will vary across individual firms and industry sectors, but as a general matter, many organizations resist changing their internal processes and core functions.<sup>44, 50</sup> While this inertia assures stability and reliable performance over shifting conditions, in some cases, conditions change in ways that render the firm’s standard behavior inefficient or socially detrimental.<sup>51</sup>

Even assuming that a particular firm is operationally nimble, that trait alone is not sufficient to conclude that the firm is best left to its own devices in responding to the challenges of nanotechnology management. The firm will also need the requisite information regarding the hazards of that technology and the technical skills to select and to implement an effective response. Here, the heroic image of the environmentally conscious firm acting swiftly on the basis of its deep knowledge of its own operations breaks down. For example, while companies obviously understand their processes and the needs of the market, they often lack sufficient information regarding the chemicals and (sometimes ill-defined) materials they use in those processes to adequately protect their own employees. Likewise, extensive experience in a particular industrial process does not assure knowledge about the nature or proper management of emissions or wastes from that process.<sup>19, 52</sup> Recent surveys of companies producing and using nanomaterials provide troubling evidence that such knowledge gaps are an impediment to effective management of nanomaterials.<sup>53-55</sup> Third parties such as trade associations can help to mitigate the problem by coordinating the collection and dissemination of information across the relevant industry sector. But dynamics in the business environment raise meaningful concerns about the completeness and accuracy of the information developed by trade associations. They are not simply neutral coordinators, but instead are strategic actors who may have incentives to withhold information, or to skew it so as to reduce costs to the industry or to benefit players within the industry having disproportionate influence over the association.<sup>19</sup>

Recasting  
Regulation and the  
Regulators

**T**urning now to the regulatory side of the story, we see that the soft law’s narrative here is likewise flawed, both with respect to the nature of direct regulation and the capacity of regulatory agencies. Conventional direct regulation is typically depicted as a rigid, top down, one-size-fits-all approach. In particular, soft law advocates tell a story of regulation in which agencies establish prescriptive exposure limits based upon extensive toxicological and exposure data.

According to the soft law narrative, it is this data-intensive approach that prevents the effective application of direct regulation in the data-poor environment of nanotechnology policy. This narrative mischaracterizes conventional regulation in two important ways.

First, while it is true that some regulatory programs rely heavily upon toxicological and exposure data to trigger regulatory action or set acceptable exposure levels, it is also true that many do not. In the United States, health standards under the Occupational Health and Safety Act (OSHA) are an example of the former, whereas emission standards under the Clean Air Act (CAA) and management standards in the federal hazardous waste programs are examples of the latter. Indeed, several CAA programs eschew risk assessment altogether, instead developing emissions limits based upon the best practices used within the relevant industry sector. The limits are almost uniformly written as performance standards, meaning that individual facilities are free to select the means of attaining the standard. Moreover, standard setting takes into account differences among firms within the relevant sector by breaking the sector down into categories and sub-categories based upon company size, type of process, and other relevant factors, and—to the extent appropriate—setting different emission limits for the categories and sub-categories.<sup>19</sup>

Second, although conventional regulation often does involve standard setting (whether technology-based or risk-based), it is substantially broader than the narrow soft law narrative suggests. Two other types of direct regulation commonly used in existing programs are information-based regulation and management-based regulation. Information-based regulation is intended to address situations in which the regulated firm has information regarding its operations not otherwise available to the government or some relevant third party. Thus, under the hazardous waste regulations, generators of hazardous waste must report data regarding waste generation and disposal to the government. Likewise under OSHA, manufacturers of hazardous chemicals must provide specified information to downstream commercial users. Management-based regulation requires companies to develop and to implement facility plans and procedures for evaluating and addressing various hazards.<sup>56</sup> For example, as part of the Risk Management Program established under the CAA, the EPA requires certain firms to prepare and to implement risk-management plans, including a specific obligation to develop appropriate management systems.<sup>57, 58</sup> As discussed below, each of these types of direct regulation can play an important, immediate role in nanotechnology regulation.

Pessimism about the capacity of government as a regulator dissipates when the role of the government is clarified. Clearly, there are substantial troubling questions regarding the capacity of government to “micro-manage” individual facility operations, particularly under the conditions of uncertainty surrounding nanotechnology. However, regulators are particularly well suited to engage in the actual type of regulatory activity typically taken: the nuanced codification of best practices and

the implementation of information-based and management-based programs. For example, using broad information-collection authority arising from the CAA, the EPA gained extensive experience in collecting and disseminating data regarding best practices in terms of engineering and management. In doing so, it leverages the capacities of the trade associations as participants in the design and implementation of those collection activities. Unlike informal efforts of trade associations and research institutions, this formal authority reaches all members of the relevant industry and provides sanctions for recalcitrant or deceitful facilities.<sup>19</sup>

Where adequately funded, a government agency can also serve as a relatively neutral referee, providing coordination and direction when management practices across an industry sector conflict. Through its standard-setting process in the CAA, EPA served this role in the context of a mandatory rulemaking process. (The National Institute for Occupational Safety and Health's nanotechnology activities through the Nanotechnology Research Center is a particularly salient example of this coordination and guidance role in the nanotechnology context, albeit as part of a non-regulatory voluntary program.<sup>59</sup>) The public nature of the CAA rulemaking process, which invites participation from a broad range of interested parties, coupled with the right of judicial review, provides a level of accountability, legitimacy, and transparency not evident in voluntary soft law approaches.<sup>19</sup> These features are enhanced by the regulatory agency's capacity to ensure quality control through compliance assistance and enforcement, assuming the agency is provided sufficient resources.

#### Conclusions and Prospects

The above discussion challenged the soft law narrative regarding businesses incentives and capabilities, and concerning the structure of direct regulation and the capacities of the regulatory agencies. It offers a different story, one which is skeptical of the role that normative and economic incentives play in securing safe business behavior, and more optimistic about the ability of government to regulate successfully. But what would be the nature and scope of a nanotechnology regulatory regime that embraces that alternative story? While extensive discussion is beyond the scope of this article, it is useful to sketch out the potential framework for an alternative *iterative* approach to regulation.

Iterative regulation is based on two organizing principles. First, where reasonable concerns are raised about a nanomaterial in the scientific literature, regulators should make reasonable efforts to minimize potential hazards in the near term.<sup>60</sup> Although existing information gaps largely preclude the setting of quantitative technology-based or health-based exposure limits, a variety of qualitative best practices for managing nanotechnology do exist. Examples of such practices range from the streamlined approaches to risk evaluation such as control banding, to guidelines

for the selection and use of specific engineering controls and work practices.<sup>59, 61</sup> It is unlikely that those best practices will diffuse broadly and consistently throughout the relevant industry sectors absent government intervention in the form of direct regulation. Thus, regulators should deploy the full suite of direct policy tools in promoting the diffusion and effective implementation of best practices, including information disclosure and management-based regulation. Thus, agencies would use existing or newly granted information-based regulation to identify a range of best practices, and mandate that individual firms evaluate, select, and implement best practices most suitable to their operations.

Second, the nature, scope, and rigor of the regulatory action should adjust over time to reflect improvements and developments in data availability and scientific methodologies. So, for example, as toxicity testing and risk-evaluation methods progress, regulators may move from qualitative best practices to quantitative exposure limits. Alternatively, efforts are currently underway to develop methods for systematically identifying and evaluating safer alternative materials and processes. The National Institute for Occupational Safety and Health's Prevention through Design (PtD) initiative is one example of this approach, which seeks to anticipate and to "design-out" potential hazards in products and processes.<sup>62</sup> Other researchers are developing formal decision-analysis tools such as multi-criteria decision analysis methods to assist in comparing alternatives.<sup>16</sup> Such methodologies may eventually enable regulators to shift from a conventional risk-management approach focused on setting acceptable levels to a comparative approach seeking the safest viable alternative. The promise of such future regulatory developments, however, need not and should not hinder the use of currently available conventional approaches in the interim.



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Following law school at Yale, Dean Moran clerked for Chief Judge Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit and worked for the San Francisco firm of Heller Ehrman White & McAuliffe. She joined the Boalt faculty in 1983. She was a visiting professor at UCLA, Stanford, New York University, the University of Miami, the University of Texas, and Fordham University School of Law. From 1993 to 1996, she served as chair of the Chicano/Latino Policy Project at UC Berkeley's Institute for the Study of Social Change, and in 2003 she became the director. In 1995, she received the UC Berkeley Distinguished Teaching Award.

Dean Moran is highly active in the legal community. She was appointed as President of the Association of American Law Schools (AALS) in 2009. She is a member of the American Law Institute and served on the Executive Committee of the AALS. She sat on the American Bar Association's Standing Committee of the Division of Public Education and on the executive board of the Berkeley Law Foundation. She currently serves on the board of advisors for the *Texas Hispanic Journal of Law and Policy*.



# WHAT COUNTS AS KNOWLEDGE? A REFLECTION ON RACE, SOCIAL SCIENCE, AND THE LAW

Rachel F. Moran\*

In the years since the U.S. Supreme Court handed down *Brown v. Board of Education*,<sup>1</sup> most discussions of the case have focused on whether it was effective in promoting lasting equality of opportunity in the public schools. Although this profoundly important question dominates retrospectives on *Brown*, another unresolved controversy relates to whether the ruling has altered in any fundamental way the role of social science evidence in constitutional litigation. More than 50 years later, substantial disagreement persists about whether this kind of research has played or should play any important role in the jurisprudence of race. Today, social scientists face increasing doubts about their neutrality and objectivity, struggle to be heard in a marketplace of ideas increasingly flooded with information of questionable quality, and encounter growing resistance to the notion that expertise provides a proper foundation for legal decisionmaking. For those who still believe that social science has a role to play in advancing racial justice, the strategy used in *Brown* can no longer be taken for granted. The time is ripe to reassess what counts as knowledge so that social science is not increasingly marginalized in courts of law.

The gap between *Brown's* multidisciplinary aspirations and today's jurisprudential realities derives at least in part from inherent tensions between the epistemologies of law and social science, tensions that were not fully addressed in the flush of a landmark school desegregation victory. As Susan Haack, a professor of law and philosophy, explains:

The culture of the law is adversarial, and its goal is case-specific, final answers. The culture of the sciences, by contrast, is investigative, speculative, generalizing, and thoroughly fallibilist: most scientific conjectures are sooner or later discarded, even the best-warranted claims are subject to revision if new evidence demands it, and progress is ragged and uneven. . . . It's no wonder that the legal system often asks more of science than science can give, and often gets less from science than science could give; nor that strong scientific evidence sometimes falls on deaf legal ears, while flimsy scientific ideas sometimes become legally entrenched.<sup>2</sup>

[Social Science Enters the Courtroom: Does This Evidence Generally Count As Knowledge?](#)

Haack contends that the divergence of law from science calls into question the very legitimacy of the adversarial process as a truth-finding device—at least when “key factual questions can be answered only with the help of scientific work beyond the comprehension of anyone not trained in the relevant discipline.”<sup>3</sup>

The clash of epistemologies that Haack describes has grown even more fraught due to an information explosion that makes quality control urgent yet extremely difficult to achieve. According to law professor Elizabeth Warren, because research can play a strategic role in calls for reform, markets for data have arisen that distort the neutrality and objectivity of expertise. The problem is especially pressing when the flow of information is unregulated, for example, in the political process. As she writes,

In the rough and tumble world of legislative policy-making and campaigns to shape public opinions, there is . . . no concept of junk science, no datum too filthy or too bizarre to be barred from the decision-making process. Instead, when legislative decisionmaking is at stake, the free market of the economists’ happiest dreams exists: an unrestricted and rough world of competing ideas, information, and misinformation that parties will evaluate based on quality signals—and their own idiosyncratic needs.<sup>4</sup>

Warren worries that assurances of quality, particularly those associated with an academic reputation for independence and integrity, have been seriously degraded. Increasingly, scholars must seek outside funding to support their work. As government grants shrink, there is increasing pressure to undertake research for hire. According to Warren, “For anyone who does independent academic research, who has little to trade in but her independence and reputation, the idea that the market for data has devalued the premier signal for independence and quality—university affiliation—is deeply discouraging.”<sup>5</sup>

Though Warren focuses primarily on the troubled relationship between law and social science in the legislative realm, courts have not been exempt from these perils. Judges have worried about whether “hired guns” distort the pursuit of the truth in the adversarial process. Justice David Souter sparked a firestorm of controversy when he announced in *Exxon Shipping Co. v. Baker*<sup>6</sup> that the Court “decline[d] to rely” on research that ran counter to anecdotal reports on the unpredictability of punitive damage awards. Justice Souter dismissed the studies because they had been funded by Exxon, which sought to limit its liability after a major oil spill in Alaska.<sup>7</sup> Justice Souter’s comments were especially hard-hitting because some of the rejected work was prepared by prominent scholars and published in prestigious law journals.<sup>8</sup> Though directed at Exxon’s efforts to manipulate the academic debate, Justice Souter’s skepticism clearly had ramifications for the credibility of social science evidence more generally.<sup>9</sup> Indeed, to identify work potentially

tainted by bias, the Court now requires friends of the court to disclose any source of compensation that could distort their submissions.<sup>10</sup> Despite efforts to root out misleading evidence, one sociologist involved in the *Exxon Shipping* litigation has concluded that “The legal system and the scientific method co-exist in a way that is really hard on truth.”<sup>11</sup>

Battles over the meaning of racial equality are not apt to attract the sort of big-money players involved in corporate and business disputes like the *Exxon Shipping* case. Nonetheless, high-profile public interest litigation is extremely polarized and inevitably triggers an arms race for amicus briefs. In the late 1940s and early 1950s, amicus briefs were filed in 23 percent of cases litigated before the Supreme Court. With the advent of a public law litigation model, the number rose to 85 percent in the late 1980s and early 1990s. The mean number of briefs filed in each case also went up, especially when a prominent social controversy was at issue.<sup>12</sup> Cases with more than 20 amicus briefs first appeared on the Court’s docket in the 1970s. *Regents of the University of California v. Bakke*<sup>13</sup> held the record with 57 briefs until it was toppled by *Webster v. Reproductive Health Services*<sup>14</sup>, an abortion case with 78 briefs.<sup>15</sup> More recently, the affirmative action lawsuits against the University of Michigan attracted record numbers of amici.<sup>16</sup> Of course, not all these briefs were filed by social scientists, but typically, at least some of them were.<sup>17</sup>

Confronted with an onslaught of information, the Court has struggled to regulate access to the adversarial process in a meaningful way. In the early 1990s, the justices revisited the standards for admitting expert testimony in *Daubert v. Merrill Dow Pharmaceuticals*.<sup>18</sup> Previously, the *Frye*<sup>19</sup> test had looked to whether findings were generally accepted in the scientific community to decide whether research was reliable. The *Daubert* decision added several additional criteria, including the falsifiability of the findings, the known or potential error rate for the methodology, and peer review and publication of the results.<sup>20</sup> The changes were made in response to fears that “junk science” was entering the courtroom.

This new approach empowered courts to second-guess the experts’ conventional wisdom, given increasing doubts about the integrity of the partisan evidence being introduced.<sup>21</sup> *Daubert*, however, created problems of its own. For one thing, it was not clear that judges were competent to make independent assessments of scientific reliability.<sup>22</sup> For another, a significant body of evidence did not conform to *Daubert’s* model of scientific inquiry, which was based on traditions in the natural and physical sciences.<sup>23</sup> As a result, trial courts had to treat some expert testimony as “other specialized knowledge,” which further muddied the standards for admissibility.<sup>24</sup>

Most of the controversy surrounding *Daubert* has ignored the way in which it targeted adjudicative facts, specific factual questions that arise in applying a doctrinal principle. The standard did not reach legislative facts, which inform courts in making normative judgments about relevant policy concerns.<sup>25</sup> So, for example, in

*Brown* itself, data on the equalization of teachers and facilities in segregated schools related to adjudicative facts. The findings pertained to whether conditions in each school district satisfied the “separate but equal” doctrine.<sup>26</sup> Today, in an affirmative action lawsuit, data on the weight given to race in the admissions process also would be an adjudicative fact. These studies evaluate whether race is so influential that it operates as an impermissible quota rather than a constitutionally acceptable plus.<sup>27</sup> Expert testimony on adjudicative facts like these is carefully scrutinized for reliability under *Daubert*.

*Brown’s* brave new vision, however, was focused on social science’s role in effecting transformation in the law, not merely in resolving narrow factual questions under existing doctrine. So, in *Brown*, research on the inescapable harms of segregation, even in dual school systems that had equalized, was a legislative fact. It bore on the normative question at the heart of the Court’s constitutional dilemma: Could separate ever be equal?<sup>28</sup> In *Parents Involved in Community Schools v. Seattle School District*,<sup>29</sup> studies on the benefits of diversity in elementary and secondary schools played an analogous role. This research was deployed to support a normative commitment to color consciousness, not just as a remedy for past discrimination but as a bridge to a multiracial future.<sup>30</sup>

*Daubert* does not reach evidence on legislative facts, which judges are free to admit at their discretion. For that reason the Court has been able to adopt a liberal, open-door policy on amicus briefs. Though a formal rule mandates that briefs be submitted only when they provide new factual or legal information, in practice the Court grants nearly every application to file.<sup>31</sup> This open-door policy is important to *Brown’s* multidisciplinary legacy because amicus briefs can address legislative facts that counsel may not address due to procedural and evidentiary constraints.<sup>32</sup> Yet merely submitting evidence is not the same as wielding influence, particularly when there are few safeguards to assure reliability and relevance.

The real business of sifting through amicus briefs occurs when the justices and their clerks decide which ones are worth reading. These choices are made behind closed doors, leaving the impact of any submission hard to gauge. There are anecdotal accounts that amicus briefs often become part of a vast unread literature.<sup>33</sup> Yet some do feature in the Court’s opinions. Indeed, one common way of measuring the briefs’ influence is to count how many times they are actually cited.<sup>34</sup>

This approach yields mixed results. The Court has grown increasingly willing to refer to amicus briefs in decisions. From 1946 to 1955, 17.60 percent of all opinions cited an amicus brief, a figure that steadily grew in the ensuing decades to 27.57 percent in 1976–1985 and then to 36.97 percent in 1986–1995.<sup>35</sup> Nonetheless, the likelihood that any particular brief will make its way into an opinion remains quite low. For instance, just 3 percent of all amicus briefs filed were actually cited between 1946 and 1995.<sup>36</sup> Given these long odds, only a few repeat players like the Solicitor General could feel relatively confident of getting the justices’ attention.<sup>37</sup>

The analysis of citation rates has been supplemented by an examination of success rates for amicus brief filers—that is, how often they prevail relative to an overall rate of winning outcomes. Once again, the results are not straightforward. Amici generally do not bolster the chances that a petitioner who has successfully obtained a grant of certiorari will win; however, amicus briefs do systematically enhance a respondent’s chances of prevailing. A notable exception is the Solicitor General, who enjoys an extraordinary rate of success, whether supporting the petitioner or the respondent.<sup>38</sup>

These studies do not address the impact of briefs filed by social scientists in particular. This is an issue worthy of further exploration, but there are reasons to doubt that the submissions exert any special pull on the Court. Scholars, who typically participate in cases on an ad hoc basis, are unlikely to enjoy the substantial reputational advantages that come with being a repeat player. To mitigate this disadvantage, briefs can boast multiple signatories, preferably from prestigious institutions, to enhance credibility and clout.<sup>39</sup> Moreover, enlisting organizational support, for example, from professional associations, may help as well.<sup>40</sup> Social science briefs, to the extent that they are filed in controversial cases, face special obstacles because of the large numbers of submissions on each side. In this sort of arms race, amici are not likely to affect outcomes unless they offer original arguments.<sup>41</sup> Yet very few amicus briefs are cited for their substantive propositions, and these typically are filed by repeat players, most notably the Solicitor General.<sup>42</sup>

Even with a dramatic expansion in amicus participation, there is no decisive support for the argument that briefs filed by social scientists shape the judicial decisionmaking process. The unique impact of repeat players in the Supreme Court bar, especially the Solicitor General, probably has little to do with *Brown’s* multidisciplinary turn. If anything, the justices are likely swayed by the trustworthiness of legal interpretations offered by these experienced practitioners, not by their artful use of nonlaw experts. Until further study is done, the impact of social science evidence—at least when introduced in amicus briefs—will remain an open question.<sup>43</sup> Available research on citation counts and success rates could be usefully supplemented by efforts to gauge the impact of expert testimony in other settings, such as lower court proceedings and the Supreme Court’s grant of petitions for certiorari.<sup>44</sup>

Inquiries like these shed some light on whether a proliferation of amicus briefs amounts to nothing more than a thin veneer of constitutional empiricism. According to legal scholar Timothy Zick, the Court cites findings selectively, deploying social science information in ways that blunt its actual impact on outcomes.<sup>45</sup> If he is correct, then social science evidence is mere window dressing in constitutional disputes. The haunting possibility therefore remains that an arms race in amicus briefs, including those filed by social scientists, has not changed in any definitive way what counts as knowledge in the courts.

In discussing the role of experts, Haack<sup>46</sup> describes irreducible tensions between law and social science as distinct ways of understanding the world. What *Brown* augured, however, was a change in the courts' epistemological universe, one that would reconcile these different ways of knowing. Sociologists Philippe Nonet and Philip Selznick describe *Brown* as the triumph of "responsive law," which requires legal institutions to "give up the insular safety of autonomous law and become more dynamic instruments of social ordering and social change. In that reconstruction, activism, openness, and cognitive competence . . . combine as basic motifs."<sup>47</sup> Responsiveness should make law look more like science. To use Haack's words, legal analysis becomes "investigative, speculative, generalizing, and thoroughly fallibilist," and like most scientific conjectures, "even the best-warranted claims are subject to revision if new evidence demands it, and progress is ragged and uneven."<sup>48</sup>

With this flexibility and openness, a responsive model of the law can be generous—even bold—in using social science evidence to reconsider fundamental normative commitments, much as the *Brown* Court was. Social pressures then become "sources of knowledge and opportunities for self-correction."<sup>49</sup> This approach is not without risk, however. As courts become increasingly receptive to alternative sources of knowledge, the adjudicative process loses its claim to a unique authority. This loss of authoritativeness in turn jeopardizes integrity, although Nonet and Selznick ultimately conclude that the gains justify the costs. In particular, other forms of knowledge, including social science, enable courts to distill the meaning of the public good in ways that transcend a purely self-interested use of political power.<sup>50</sup>

Today, the Supreme Court is awash in information, a phenomenon that might appear to vindicate responsive law's possibilities.<sup>51</sup> Yet as already noted, bombarding the justices with briefs does not necessarily mean that social science becomes a source of knowledge for self-correction. Writing about the Rehnquist Court, Zick contends that constitutional empiricism often has served as a smokescreen to reinstate a formalistic approach to the law.<sup>52</sup> In his view, the Rehnquist Court was able to manipulate research because there were no clear benchmarks for interpreting the findings. Without a "way to distinguish 'good' and 'bad' empirical results," he asserts, "courts [were] not using data to falsify their own notions of what the law should be, but to support their claims of what the law is."<sup>53</sup> Contrary to appearances, the Rehnquist Court's epistemological universe did not expand, and the divide between law and social science evidence remained wide. According to Zick, research remained subordinated to legal verities, always confirming rather than testing them.

Under Chief Justice William Rehnquist's successor, Chief Justice Roberts, the Court now includes a plurality of justices who embrace formalism. They do not indulge in any pretense of constitutional empiricism and so largely exclude social science evidence as a way of knowing. Chief Justice Roberts and his colleagues, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito share a belief that law is abstract and universal; it can be discerned from legal texts and, for some of the justices, from legal history.<sup>54</sup> This jurisprudential philosophy has significant epistemological consequences. According to legal scholar Grant Gilmore,

[Formalism] seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal.<sup>55</sup>

Under this closed system of American law, "[s]tare decisis [with its assumption of limited change in the law has] reigned supreme."<sup>56</sup>

Because legal interpretation does not require attention to context or changing conditions, formalism maximizes the tensions between law and science as ways of knowing. A formalist approach requires courts to look to their judicial predecessors, not contemporary social scientists, to determine what the law should look like. Haack's dichotomy reemerges with a vengeance: Law is immutable; science is tentative; law is certain; science is speculative. At most, then, social science can speak to adjudicative facts, but it cannot offer up legislative facts that serve as the motive force in a public law litigation model. For instance, in the challenge to affirmative action at the University of Michigan, the constitutionality of race-conscious admissions policies would depend entirely on the text of the Fourteenth Amendment and perhaps its history, but certainly not on social science research on the benefits of diversity that Michigan had amassed.

Given *Brown's* precepts, the decision has been something of a thorn in the formalists' side. After all, the reasoning in Chief Justice Warren's opinion, including footnote 11, bears little resemblance to the closed epistemological universe that Chief Justice Roberts and his colleagues envision. In a recent debate over constitutional philosophy, Justice Breyer asked how *Brown's* result could be squared with Justice Scalia's commitment to strict reliance on constitutional text. Justice Scalia did not answer the question, but he has called the tactic "waving the bloody shirt of *Brown*."<sup>57</sup> In truth, dramatic changes in American race relations, catalyzed in part by the Court's constitutional leadership, pose a seemingly insurmountable challenge to the static system of jurisprudence that formalists endorse.

Perhaps reacting prudentially to the “bloody shirt,” other members of the Court have declined to adopt a formalist philosophy. In *Grutter*, for example, Justice O’Connor penned the majority opinion, which clearly rejected a textualist claim that the Constitution is color-blind based on race-neutral language that “no State shall deny to any person within its jurisdiction the equal protection of the laws.”<sup>58</sup> Instead, her decision rested on the diversity rationale without reaching more profound questions of social justice. According to law professor Cass Sunstein, Justice O’Connor was practicing the virtues of “judicial minimalism.”<sup>59</sup> Minimalism, as Sunstein defines it, is a far cry from responsive law. A minimalist judge strives, to the extent possible, to reserve legislating for legislators. Courts therefore dispose of cases on grounds that “leave open the most fundamental and difficult constitutional questions.”<sup>60</sup> In doing so, judges allow the democratic process to resolve complex questions that provoke deep and divided views among the citizenry.

In the area of affirmative action, for example, a minimalist adopts neither a strictly color-blind approach that bans race-conscious admissions policies, nor a theory of justice that would legitimate quotas and set-asides. As Sunstein says, members of the Court who adhere to minimalism have “endorsed no rule and no theory” in this hotly contested area.<sup>61</sup> Their stance “has, however, attempted to help trigger public debate, with, perhaps, an understanding on the part of some of the justices that until recently, the debate was neither broadly inclusive nor properly deliberative—and that it did not honestly reflect people’s underlying concerns.”<sup>62</sup> Because this jurisprudential strategy has been democracy-promoting and keeps the discussion of affirmative action alive, Sunstein concludes that it is “possible to celebrate what many have seen as the Court’s indefensible course of rule-free judgment.”<sup>63</sup>

Race presents some unique problems for Sunstein’s celebratory account of minimalism, particularly insofar as *Brown* itself “appears to be the strongest example against the claim that [Sunstein means] to defend.”<sup>64</sup> In an attempt to reclaim the jurisprudential high ground, Sunstein argues that *Brown* “was far less maximalist than it might seem; it can even be taken as a form of democracy-promoting minimalism.”<sup>65</sup> To justify this rather improbable statement, he relies on the fact that the landmark decision was the culmination of a litigation campaign that involved incremental victories. Moreover, in *Brown II*,<sup>66</sup> when the Court addressed implementation of its pathbreaking school desegregation decision, the justices relied on a gradualist approach. The decision to integrate “with all deliberate speed” allowed the Court to wait until the political branches signaled their support before moving aggressively to enforce the integration mandate.<sup>67</sup>

Sunstein’s account of *Brown* is not wholly satisfactory. Efforts to integrate higher education in the years before *Brown* were arguably maximalist in their way. Certainly, images of George McLaurin, an African American graduate student, sitting in roped-off sections of the classroom, cafeteria, and library at the University of Oklahoma suggest that democratic deliberation was, standing alone, unlikely

to carry the day.<sup>68</sup> Nor do memories of forcible integration, for example, when President Dwight D. Eisenhower sent federal troops to Little Rock, Arkansas, indicate that dialogue and reason were the spur to meaningful implementation of the Court's mandate.<sup>69</sup> If minimalism prizes judicial humility and deference to the political process, Chief Justice Warren and his opinion in *Brown* seem unlikely candidates for accolades. After all, President Eisenhower, in the wake of the desegregation decision, described "[t]he appointment of that S.O.B. Earl Warren" to the Supreme Court as the worst mistake of his Presidency.<sup>70</sup>

If anything, Sunstein's account suggests the limits of responsive law, the political perils that come with judicial engagement in broad social controversies. These dangers in turn explain the Court's gradual retreat from the bold innovations of the Warren Court. Through the judicial appointments process, Congress has steadily populated the Court with justices who—at least during the nomination hearings—expressly disavow any desire to make rather than apply the law. Confirmation proceedings have served as a vehicle to discredit responsive law by treating it as the province of wayward judicial activists.<sup>71</sup> Law professor Stephen Carter attributes the shift directly to the Supreme Court's stand on school desegregation:

*Brown* changed everything. Infuriated by the Supreme Court's temerity in striking down public school segregation, the Southern Democrats who in those days still largely ran the Senate began to require that all potential justices give testimony before the Judiciary Committee. When the nominees appeared, the Dixiecrat Senators grilled them on *Brown*. The first was John Marshall Harlan in 1955, who declined invitations to discuss either specific cases or judicial philosophy as a matter of "propriety." One by one, later nominees followed his example.<sup>72</sup>

According to Carter, today's hearings "follow the same model that they did half a century ago when the Dixiecrats invented them."<sup>73</sup> This screening process, then as now, is designed to limit the prospects for responsive law, including its openness to social science evidence as a source of normative guidance.



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# CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE

Lynn A. Stout\*

What's the best way to get people to behave themselves? Legal and policy experts often assume that people are fundamentally selfish creatures who respond only to punishments and rewards, and who can't be trusted to do a good job or refrain from lying, cheating and stealing unless given the right "incentives." Are CEOs neglecting their firms? Tie their pay to share price with stock grants and options. Are America's children failing to learn their ABCs? Give teachers bonus pay if they raise test scores, and fire them if they don't. Are Medicare expenses increasing too quickly? Use "pay for performance" schemes that give doctors and hospitals a direct financial motive for keeping health care costs down.

This emphasis on "incentives" and "accountability" relies on a homo economicus model of purely selfish human behavior that was developed for theoretical economics, but has since been embraced by policymakers, business leaders, and experts in a wide range of fields from political science to philosophy. Today, it's hard to find a serious discussion of the possibility that we might encourage or discourage particular behaviors by appealing not to selfishness, but instead to the force of conscience. Many modern experts would snicker at the very idea. Conscience is viewed as the province of religious leaders and populist politicians, not lawyers, businessmen, or regulators.

This is odd, for every day we see people behaving ethically and unselfishly—few of us shake down kindergartners for lunch money or steal the paper from our neighbor's yard, and many of us go out of our way to help strangers. Our very language reveals our preoccupation with moral assessments. Just as the Inuit have many nouns for snow, English has a multitude of words to describe unselfish, conscience-driven behavior, including: virtuous; kind; fair; agreeable; honest; ethical; trustworthy; decent; upright; faithful; altruistic; humane; loyal; charitable; selfless; principled; conscientious; cooperative; generous; considerate; caring; and compassionate. Most tellingly, another simple word often used to describe unselfish behavior is "good."

Policymakers and business leaders nevertheless usually overlook the unselfish, "prosocial" side of human nature, fixating instead on selfish misbehavior and

Blind to Our Own  
Goodness

how to stop it. This fixation may stem in part from certain biases in perception. For a surprising variety of reasons, including our psychological quirks, the structure of our language and our society, and the way we select and train experts in law, economics, and business, we tend not to “see” ethical and unselfish behavior, even when it happens under our very noses. Americans watched their television screens aghast when dozens of New Orleans residents began looting in the lawless wake of Hurricane Katrina. Few of us stopped to marvel at, or even notice, the miracle of the thousands of New Orleans residents who were not looting.

This collective blindness to our own capacity to act conscientiously—or, as behavioral scientists might put it, our capacity to act prosocially—can lead us to overlook the reality, and importance, of goodness, causing us to neglect the crucial role our better impulses could play in shaping society. Rather than leaning on the power of greed and selfishness to channel human behavior, our laws and policies might often do better to focus on and promote the force of conscience—the cheapest and most effective police force one could ask for.

Experimental  
Gaming and  
the Science of  
Conscience

Luckily, modern behavioral science offers policymakers a guide for how to put conscience to work. To a behavioral scientist, conscience shows itself in the form of unselfish prosocial behavior—someone making a material sacrifice in order to help or avoiding harming another, or to follow ethical rules. This objective approach avoids any need to speculate on the internal motivations that might drive conscientious behavior (guilt? empathy? fear of eternal damnation?). It also allows researchers in experimental economics, social psychology, and evolutionary biology to empirically test for prosocial behavior both inside and outside the lab. The results of all these tests are both eye-opening and consistent. Far from being rare and quirky, unselfish prosocial behavior is not only common, but highly predictable—and easy to manipulate.

Over the past half-century, behavioral scientists have devised an ingenious parade of experiments to test what real people do when placed in situations where their material interests conflict with the interests of others. “Social dilemmas,” “ultimatum games,” “dictator games,” and “trust games” all test what human subjects actually do in various situations where they must choose between selfishness and prosociality. The results of such experiments demonstrate beyond reasonable dispute that, far from being rare, unselfish prosocial behavior is endemic. Researchers around the globe have run hundreds of experimental studies that consistently demonstrate that unselfish prosocial behavior is a real and very common phenomenon. Sometimes—in fact quite often—we sacrifice our own material payoffs in order to help or to avoid harming other people.

That possibility should interest anyone who lives among, cares about, or deals with other human beings. But it should especially interest those who study

and care about law, regulation, public policy, and business management. Each of these fields deals with the central problem of getting people to behave in the fashion we think of as “conscientious”—to work harder than the minimum required, to pay taxes instead of cheating, to keep their commitments, to respect others’ rights and property, and to refrain from violence, theft, and mayhem.

**A**t the same time, the empirical fact that people sometimes act unselfishly is only useful if we have some idea of when, and why, this happens. What determines when we act selfishly, and when we show consideration for others’ welfare and for following ethical rules?

Luckily, experimental gaming demonstrates not only that conscience (or at least conscientious behavior) exists, it also teaches a great deal about when and why conscience comes into play. In particular, the data demonstrates that while most people are willing to sacrifice for others, they are only willing to act unselfishly in certain conditions. We seem to be collectively afflicted with a “Jekyll/Hyde syndrome” that causes us to shift predictably between selfish and unselfish modes of behavior in response to certain social cues.

In particular, three social cues seem especially important to triggering unselfish prosocial behavior. The first is instructions from authority. As we have known since the days of Stanley Milgram’s infamous experiments on obedience, in which subjects obeyed instructions to administer what they thought were potentially fatal shocks to another human being (really an actor pretending to be shocked), people tend to do what they are told to do. This instinct for obedience, it turns out, can also be employed for more prosocial purposes. When asked to do so, subjects in experimental games routinely act prosocially—even when it is personally costly for them to do so.

Perceptions of others’ behavior also play a critical role. We are herd animals who act nicely when we think others are nice, and nastily when we think others will be nasty. When experimental subjects are led to believe others will act prosocially, they become more likely to act prosocially themselves—again, even when they must sacrifice to do so.

Finally, people seem more inclined to behave unselfishly in experiments when they believe others will enjoy large gains, not small, from their unselfishness. We are “intuitive utilitarians” who are willing to sacrifice more when we believe others will benefit more from our sacrifice. If I were late to work, I might not be willing to take time to stop to give directions to a lost stranger. But if the stranger fell down next to me in an apparent coma, I would take time to stop and dial 911.

By manipulating social variables like these—instructions from authority, beliefs about others’ behavior, and perceptions of benefits to others—researchers have been able to dramatically change the behavior of human subjects in experimental

games. When the social cues favor prosociality, behavioral scientists can elicit universal or near-universal unselfishness. Conversely, when subjects are told to act selfishly, believe others would act selfishly, and believe selfishness is not too costly to others, they exhibit near-universal selfishness.

#### The Role of Personal Cost

Experimental gaming thus permits us to develop a relatively simple, three-factor model in which conscience is triggered primarily by the three social cues of instructions from authority, belief in others' prosociality, and perceptions of benefits to others. At the same time, saying that social context matters does not imply that personal costs don't. People are far more capable of acting unselfishly than the homo economicus model admits. At the same time, the experimental evidence suggests that the supply of conscience is not unlimited. As the personal cost of acting prosocially rises in an experiment, the incidence of prosocial behavior observed declines.

These empirical results indicate that if we want people to be good, it's essential not to give them strong motivations to be bad. Unlike Oscar Wilde, most of us can resist small temptations. It's the big temptations that do us in.

#### Using Conscience

The reality of conscience thus has important implications for legal experts and policymakers. After all, law is all about changing human behavior: getting people to pay taxes they would rather not pay, perform contracts they would prefer to breach, and obey traffic laws even when the police are nowhere in sight. Of course, material rewards and punishments can be useful tools for getting people to do what we want them to do. But they are not the only behavioral tools at our disposal. When we ignore conscience and rely only on incentives to shape behavior, we are leaving some rather useful items in our behavior-shaping tool kit untouched. Worse, we may sometimes be selecting a tool so unsuited for the job that it does more harm than good.

#### An Example: The Perils of Ex Ante Incentives

As an example, consider the disturbing implications that the scientific evidence on conscience carries for the contemporary enthusiasm for trying to channel human behavior through ex ante financial incentives. This practice is particularly common in the business world, where federal tax law since 1993 has required corporations to tie executive pay in excess of \$1 million to "objective" performance metrics.

Unfortunately, behavioral science predicts this approach may often be counterproductive. Unless corporations can somehow develop "complete" employment contracts that fully specify all duties and obligations under every possible set

of circumstances, emphasizing ex ante incentives will often have the perverse and unintended effect of promoting opportunistic, even illegal, behavior. Consider how the widespread adoption of stock option plans to “incentivize” executives at Enron and Worldcom to raise stock prices had the unintended effect of incentivizing them instead to commit massive accounting frauds.

To see why this might happen, recall that unselfish prosocial behavior seems triggered by at least three important social influences: (1) instructions from authority; (2) beliefs about others’ selfishness or unselfishness; and (3) perceptions about the magnitude of the benefits to others from one’s unselfish actions. Emphasizing ex ante financial incentives undermines all three. This is because offering a material incentive to induce someone to do something inevitably sends the unspoken signal that selfish behavior is both expected and appropriate to the task at hand. It suggests that others in the same situation are behaving selfishly. Finally, it implies selfishness must somehow be beneficial. (Otherwise, why is it being rewarded?)

Incentive contracts can also create large temptations that kill off conscience. The investment banking industry, for example, is notorious for employing incentives schemes that allow its traders to reap rewards that may reach into the millions of dollars. As we have seen in recent years, in the effort to reap these rewards, Wall Street traders took on excessive risks that nearly brought down their firms and the wider economy. Similarly, mortgage brokers paid bonuses for loan volume approved millions of inappropriate and shaky subprime loans.

Unless done very carefully, focusing on extrinsic incentives can have the unfortunate side effect of “crowding out” internal incentives like trustworthiness, honor, and concern for others’ welfare. Emphasizing material incentives, it turns out, does more than just change incentives. At a very deep level, it changes people. Relying too much on selfishness can become a self-fulfilling prophecy. By treating people as if they should care only about their own material rewards, we ensure that they do.

**W**hy should contemporary legal and policy experts be eager to do the extra work needed to incorporate the idea of conscience into their analysis? The answer is simple: we can’t afford not to. Peace and prosperity depend on our human capacity for courtesy, consideration, and forbearance. Today, unselfish prosocial behavior is so deeply woven into the warp and woof of Western life it often goes unnoticed. People take cash out of ATM machines without hiring armed guards; beefy young men stand patiently in line behind frail senior citizens; drivers wait for red lights to turn green, even when the police are nowhere in sight. We take for granted the countless unselfish acts of cooperation and restraint that bind us together in a civil society, just as we take for

**Taking Conscience  
Seriously**

granted the gravitational force that keeps us from floating out into space.

But just as we cannot live well without gravity, we may not be able to live well without conscience. The statistical evidence indicates that cultural habits of unselfish prosocial behavior are essential to both economic growth and psychological wellbeing. Evidence is also accumulating that unselfish prosocial behavior is on the decline in the United States. Just as environmental scientists have become concerned about many sources of scientific data that point to the possibility of global warming, some social scientists have become concerned about the growing evidence that points to the possibility of “conscience cooling.”

If Americans are indeed becoming collectively more selfish, unethical, and asocial—concerned only with their own material welfare, and not with the fates of their communities, nation, or future generations—this shift threatens both our happiness and our prosperity. We need to respect, and cultivate, conscience.

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**ENDNOTES**





**Adam Winkler**

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Adam Winkler is a specialist in American constitutional law. His wide-ranging scholarship has touched upon a diverse array of topics, such as the right to bear arms, corporate political speech rights, affirmative action, judicial independence, constitutional interpretation, corporate social responsibility, international economic sanctions and campaign finance law. His work has been cited and quoted in landmark Supreme Court cases and his commentary featured on *CNN*, *The New York Times*, *The Los Angeles Times*, *The Wall Street Journal*, *The New Republic* and numerous other outlets. He is a contributor to *The Daily Beast* and *The Huffington Post*.

In September of 2011, his new book, *Gunfight: The Battle over the Right to Bear Arms in America*, will be published by W. W. Norton. Previously, Professor Winkler edited the six-volume *Encyclopedia of the American Constitution* (2nd edition) with Professor Ken Karst of the law school and the late Pulitzer Prize-winning legal historian Leonard Levy.

Prior to joining UCLA School of Law, Professor Winkler clerked on the United States Court of Appeals and practiced law in Los Angeles.



## HELLER'S CATCH-22

Adam Winkler\*

**J**oseph Heller's satirical novel *Catch-22* is a classic of American literature.<sup>1</sup> The novel, which follows the travails of a group of military airmen in World War II, is an insightful and humorous account of the quagmires and incongruities of contemporary bureaucratic life. In the novel, a "Catch-22" is a nonexistent military rule that, by its self-contradictory logic, all service personnel must obey. The notion of a Catch-22 has since become famous as representing a no-win situation built on illogic and circular reasoning. I.

Just as Heller's novel is widely regarded as one of the greatest novels of the twentieth century, the Supreme Court's recent decision in a case bearing the *Catch-22* author's surname, *District of Columbia v. Heller*,<sup>2</sup> which held the Second Amendment protects an individual right to keep and bear arms unrelated to militia service, has been hailed as one of the most significant constitutional law decisions of the twenty-first century. In more substantive ways, however, Heller and *Heller* belong together. Although the Supreme Court properly interpreted the Second Amendment to guarantee an individual right to possess guns, the majority's reasoning suffers from many of the contradictions and paradoxes that animate Joseph Heller's novel.

**A** particularly striking inconsistency in the *Heller* decision is rooted in its purported method of constitutional interpretation. Justice Antonin Scalia's majority opinion was instantly hailed as "a triumph of originalism"<sup>3</sup> because of its heavy reliance on historical materials to answer a slew of Second Amendment questions: whether the amendment's reference to "the right of the people" meant an individual right or a collective, state right; whether "keep and bear Arms" had a purely military connotation; and how to construe the phrases "well-regulated Militia" and "necessary to the security of a free State."<sup>4</sup> Throughout his twenty-two years on the Court, Justice Scalia has argued that the only proper way to interpret the Constitution is by discerning the original understanding of its provisions.<sup>5</sup> Originalism, he argues, is required to maintain the public legitimacy of the Court.<sup>6</sup> II.

*Heller* was characterized as a triumph of originalism in part because even the dissenters adopt this approach, arguing that the Second Amendment was restricted to the militia. The majority and the dissenters "came to opposite conclusions but

proceeded on the premise that original understanding of the amendment's framers was the proper basis for the decision," wrote Linda Greenhouse, the Supreme Court reporter for *The New York Times*.<sup>7</sup> In light of the similar methodologies and starkly different conclusions, one might conclude that originalism should be taken with a grain of salt—or at least a dose of humility. Yet at a lecture at Harvard Law School several months after the *Heller* decision, Scalia opined on the virtues of originalism. "[W]hat method would be easier or more reliable than the originalist approach taken by the Court?"<sup>8</sup> Perhaps he had forgotten about Justice Stevens's dissent. Or perhaps he was channeling the bureaucrats in Joseph Heller's novel, who would have readily agreed that a methodology leading to such disparate conclusions is nevertheless "easy" and "reliable."

For a triumph of originalism, however, Justice Scalia's majority opinion ignores original meaning where it really counts. With any individual right, the most important questions center on what laws are prohibited by the Constitution and what laws are allowed. Individual rights are limitations on government action, so what exact limits on government action does the right to keep and bear arms impose? This is where the Second Amendment rubber hits the road. If the Second Amendment is to be a meaningful constraint on government, then it must do more than just identify a fundamental right in abstract terms. It must also separate out what the government can do from what the government cannot.

It is on these very questions that originalism plays almost no role in Justice Scalia's opinion. Consider, for example, how Justice Scalia's opinion addresses one of the laws at issue in the *Heller* case: a ban on handguns by Washington, D.C. An originalist would look to historical sources to determine whether those who ratified the Constitution thought a ban on handguns or perhaps some other specific type of weapon was contrary to the right to keep and bear arms. Scalia, however, doesn't do this. Handguns are protected, he argues, because they are "the most preferred firearm in the nation" to keep for self-defense.<sup>9</sup> After listing several reasons why twenty-first century Americans prefer handguns, Scalia's opinion concludes: "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."<sup>10</sup> In place of the rock-hard original meaning of the Second Amendment, Scalia looks to the fickle dynamics of contemporary consumer choices. Handguns are protected because people today choose handguns for protection.

In contrast to handguns, the Court suggests that machine guns might be banned because they are "dangerous and unusual weapons" that are not in "common use."<sup>11</sup> But why are machine guns so rare? Because federal law has effectively discouraged most civilians from purchasing them for the past seventy-five years.<sup>12</sup> Today, new machine guns can't even be sold to civilians. Federal gun control in the twentieth century made machine guns unusual and uncommon. So here, rather than defer to the original understanding, Scalia looks to contemporary government regulation. This sounds a lot like a right evolving with the times—that is, a living Constitution.

In constitutional law, a right is supposed to define the scope of contemporary government regulation. In the *Heller* world—or should that be the Heller world?—contemporary regulation defines the scope of the right.

*Heller* also strays from originalism in what is, for practical purposes, the most important part of the opinion. In a paragraph near the end of the opinion, the Court lists a number of “longstanding prohibitions” on guns that, despite the individual right to bear arms, remain good law: bans on possession by ex-felons and the mentally ill; bans on guns in sensitive places like schools and government buildings; and restrictions on the commercial sales of firearms.<sup>13</sup> The vast majority of gun control laws on the books today fit within these categories. So while forcefully declaring an individual right to keep and bear arms, the Court suggests that nearly all gun control laws we currently have are constitutionally permissible.

The dilemma for the originalist is that none of these broad exceptions are grounded in the original meaning of the Second Amendment. At least *Heller* makes no effort to ground these broad exceptions in original meaning. This list of Second Amendment exceptions is simply offered with no discussion whatsoever about how these exceptions comply with the Founders’ understanding of the right to keep and bear arms. *Heller* does not cite a single historical source to support these broad exceptions.

At one point in *Catch-22*, a character who has been mistreated by the military under the justification of Catch-22 is asked if the military personnel had shown her the text of the rule.<sup>14</sup> She replies that she was told that the rule stipulates that the military need not show it to her.<sup>15</sup> The military, of course, had good reason for its reluctance because the rule didn’t actually exist. Justice Scalia also had good reason to hide the originalist ball on the laundry list of exceptions. There probably is no evidence to support these particular exceptions as part of the original understanding.

Although gun rights hardliners often say that gun control is a modern invention, gun controls existed in the Founders’ day. So there are historical precedents to which Justice Scalia could have looked to determine what types of gun restrictions the Founding generation thought were consistent with the right to keep and bear arms.<sup>16</sup> For example, the armed citizenry was required to report with their guns to militia “musters,” where the weapons would be inspected and the citizens trained.<sup>17</sup> Authorities often required that militia guns be registered;<sup>18</sup> in some instances, colonists conducted door-to-door surveys of gun ownership.<sup>19</sup> There were laws requiring gunpowder to be stored safely, even though the rules (like maintaining the powder on the top floor of a building) made it more difficult for people to load their guns quickly to defend themselves against attack.<sup>20</sup> The Founders also lived with more severe limitations, including complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race.<sup>21</sup> Whites who refused to swear loyalty oaths—first to the Crown and then, when times changed, to the

Revolution—were also subject to being disarmed.<sup>22</sup> Loyalty oaths meant that somewhere near 40 percent of the population was eligible to be disarmed on the eve of the Revolution.<sup>23</sup> Couple that with the restrictions imposed on racial minorities and it turns out that only a fraction of the people enjoyed the right to own a gun. The Founders understood that guns were dangerous and warranted regulation—including, when necessary, disarmament. Little wonder the Second Amendment points to the necessity of a “well regulated Militia.”<sup>24</sup>

One thing the Founders did not do was impose any gun control laws obviously equivalent to those on Scalia’s list of exceptions.<sup>25</sup> They had no restrictions on the commercial sales of firearms as such. Licensing of gun dealers, mandatory background checks, and waiting periods on gun purchases first arose in the twentieth century. Nor did the Founders have bans on guns in schools, government buildings, or any other “sensitive place.” The Founding generation had no laws limiting gun possession by the mentally ill, nor laws denying the right to people convicted of crimes.<sup>26</sup> Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.<sup>27</sup>

The Court didn’t give any substantive explanation for why the types of laws mentioned in the laundry list were constitutional aside from a description of them as “longstanding.”<sup>28</sup> It is entirely unclear why the mere fact that these laws have been on the books for a long time saves them from legal defeat. Would Washington, D.C.’s ban on handguns have been constitutional if it were adopted in the 1920s? That a law violating the Constitution is longstanding hardly seems a good reason to uphold it.

*Heller’s* emphasis on age is especially paradoxical because the Second Amendment had long been read not to have any relevance to gun control. For the previous seventy years, the lower federal courts read the amendment to protect only a militia-related right.<sup>29</sup> During that period, many gun control laws were adopted and, thanks to the militia-based reading of the Second Amendment, upheld. Now the Second Amendment has been reinterpreted to protect an individual right, but the new reading doesn’t call those laws into question simply because they weren’t overturned earlier. Apparently, the fact that those laws survived the militia-based reading of the Second Amendment has strengthened them against challenge under the individual-rights reading.

Maybe historical research will one day uncover evidence that the Founders originally understood laws such as those on Scalia’s list of exceptions to be consistent with the Second Amendment. Yet this much is clear already: *Heller* didn’t base any of these exceptions on originalism. Worse yet, from the perspective of an honest originalist, the reasoning reflects the very living Constitution that Justice Scalia claims to abhor. Laws regulating commercial gun sales, banning guns in schools and government buildings, and disarming felons and the mentally ill are all products of the twentieth century. The exceptions trace their roots to modern era under-

standings about the right to keep and bear arms and its limits, not to Founding-era understandings.

Why does an originalist opinion accept these modern day limits on guns? One good bet is public legitimacy: if the Court had said that guns could only be regulated in ways similar to Founding-era gun control, public respect for the Court would have been sorely tested. And it would not only have been the gun control advocates who would have screamed and hollered. So too would gun rights proponents. Imagine their reaction if the Court had suggested that states could require every gun owner to report to public gatherings to have his or her arms inspected by a government official and included on a census of available militia weapons. Or that states could selectively disarm groups of people on the basis of their political views. Just call the Court's quiet reliance on living constitutionalism while claiming to be originalist, as Joseph Heller did in reference to a chaplain who learns that sinning can be excused because it feels good, a "protective rationalization."<sup>30</sup> As the chaplain discovers, it "was almost no trick at all, he saw, to turn vice into virtue and slander into truth, impotence into abstinence, arrogance into humility, plunder into philanthropy, thievery into honor, blasphemy into wisdom, brutality into patriotism, and sadism into justice."

Here we find *Heller's* ultimate Catch-22: originalism was necessary to preserve the legitimacy of the Court's decision, but the only way the decision would be deemed legitimate was if the Court adhered to a living, evolving understanding of the right to keep and bear arms.

One of the more famous lines from *Catch-22* is spoken by an old woman, who notes that the fabled rule gives the military "a right to do anything we can't stop them from doing."<sup>31</sup> In other words, the rule limiting what the military can do doesn't actually limit the military from doing anything. Due to the list of Second Amendment exceptions, *Heller* looks a lot like Catch-22: the Second Amendment limit on government doesn't stop the government from doing very much. At least this is the emerging picture of *Heller* and the newly minted Second Amendment right in the lower courts.

As many people predicted, *Heller* led to an avalanche of challenges to gun control laws. Every person charged with a gun crime saw *Heller* as a Get-Out-of-Jail-Free card. Since the case was decided, the lower federal courts have decided approximately two hundred cases in which gun control laws were challenged as violations of the Second Amendment. The variety of laws has been quite remarkable. There have been suits against laws banning possession by felons,<sup>32</sup> drug addicts,<sup>33</sup> illegal aliens,<sup>34</sup> and individuals convicted of domestic violence misdemeanors.<sup>35</sup> Courts have confronted laws prohibiting particular types of weapons, including sawed-off shotguns<sup>36</sup> and machine guns,<sup>37</sup> in addition to weapons attachments like silencers.<sup>38</sup>

III.

Defendants have challenged laws barring guns in school zones<sup>39</sup> and post offices.<sup>40</sup> Individuals charged with failing to obtain a license to carry a concealed weapon<sup>41</sup> have raised Second Amendment challenges, as have individuals who possessed an unregistered firearm.<sup>42</sup> Courts have ruled on penalty enhancements for commission of a crime while possessing a gun,<sup>43</sup> bans on possession of ammunition,<sup>44</sup> and the federal law giving the Attorney General broad discretion over gun importation.<sup>45</sup> Remarkably, nearly every one of these gun control laws has been upheld.

In most cases, the courts merely point to the list of Second Amendment exceptions in *Heller*. To the extent the challenged laws were explicitly mentioned in the *Heller* case, this outcome is not surprising. In our hierarchical judiciary, lower courts are supposed to follow the Supreme Court's decisions. One might expect, however, that the lower courts would have engaged in some substantive analysis about whether the exceptions are consistent with the underlying right to keep and bear arms. After all, the list is offered up in the *Heller* opinion without any reasoning or explanation. Moreover, none of the exceptions were formally at issue in *Heller*; they were not the subject of briefing by both sides or trial by interested adversaries. The list of exceptions was, in a first-year law student's favorite word, dicta. In the upside down universe of *Heller*, however, the dicta are what really matter.

Lower courts are also hewing closely to the list of exceptions even in cases challenging laws that were never mentioned by the *Heller* majority. For example, in several cases lower courts have upheld the federal law that bars individuals convicted of domestic violence misdemeanors from possessing firearms.<sup>46</sup> Without much substantive analysis, these lower courts have tended to simply analogize this law to the ban on felons. Of course, there is a big difference between felonies and misdemeanors—not least that gun bans applicable to domestic violence misdemeanor convicts, unlike felon bans, are not “longstanding prohibitions.” Whatever sound public policy reasons support the domestic abuser ban, the laws are a recent phenomenon: the federal law challenged in these cases was adopted in 1996,<sup>47</sup> some twenty years after the District of Columbia adopted its insufficiently longstanding ban on handguns.

Another confusing set of contradictions in the *Heller* case stems from the self-defense rationale adopted by the Court. According to the majority, personal self-defense was one of the central purposes of the Second Amendment.<sup>48</sup> The D.C. law went too far because it effectively made it illegal for a person to use a gun to defend himself in his own home.<sup>49</sup> Nevertheless, it is hard to square the right to have a gun for self-defense with the exceptions recognized by the Court. Why don't felons have the same right of self-defense as everyone else? We are really talking about ex-felons—convicts who have served their sentences and returned to the community. One might suppose that people with felony convictions are relatively likely to live in dangerous neighborhoods with disproportionately high numbers

of armed criminals. Felons therefore might need the ability to defend themselves with guns more than the average person. Why should schools be deemed a “sensitive place” where arms can be prohibited? Students and teachers in schools may need to defend themselves, too. While we might all wish that no gun ever came into a school, the awful mass murders at Columbine High School and Virginia Tech University show that students and teachers are subject to violent attack. If the basis of the right to keep and bear arms is self-defense, then it is unclear why students and teachers should be left defenseless.

Self-defense can also be undermined by restrictions on commercial sales of firearms. One common commercial sale restriction is a short waiting period: a prospective purchaser goes to a gun store, picks out a firearm, and then has to wait several days (or ten in California<sup>50</sup>) before the gun can be delivered. These laws might well be good public policy because they discourage impulse buying by a depressed person looking to commit suicide or an angry employee looking to kill the boss who just fired him. But they also interfere with self-defense. A woman who learns that she is being stalked may need a gun right away, and, if there is a delay, she could become a victim of attack. A homeowner in a town where riots have broken out may need a gun today to defend his family; next week is too late. For some people, self-defense is an immediate need with which commercial sale restrictions can interfere.

None of this is to say that the limitations on the right to keep and bear arms recognized in *Heller* are bad ones or should be invalidated as unconstitutional. They just need more justification given the *Heller* Court’s reasoning.

The simple and straightforward reason these exceptions are recognized by the Court, as Joseph Heller might have predicted, is the one that Justice Scalia explicitly rejects. The *Heller* Court goes out of its way to insist that courts should not engage in “interest-balancing” to decide Second Amendment cases.<sup>51</sup> Due to its commitment to originalism, the majority claims it would be illegitimate for courts to engage in this type of balancing: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”<sup>52</sup> But *Catch-22* teaches us that words are not always what they seem to be. While the Court rejects interest balancing in name, something very much like it underlies the many limitations on the right recognized by the Court. Felons are disarmed because they have proven themselves too dangerous to have weapons. It is not that they don’t have the right to keep and bear arms; they do, just like they have First Amendment rights of speech and religious freedom. Just like every other right, however, the Second Amendment right can be limited when the government has sufficiently important reasons to limit its exercise.

The same logic justifies the bans on guns in sensitive places and restrictions

on commercial sales. Even though these laws interfere with the ability of people to defend themselves against attack, they are nevertheless legitimate because government has sound reasons to impose them. We do not want dangerous people to obtain firearms, so we regulate commercial gun sales. We do not want guns in schools because, given the immaturity of many students, we fear that guns there will result in violence and death. These limitations survive because government is thought to have sufficiently weighty interests to justify them. History, as such, has little to do with it.

IV. *H*eller presents a final contradiction. In a twist that seems to come straight from *Catch-22*, the missteps and flaws in its reasoning actually improve the decision. Because of its failings, *Heller* is more likely to have a salutary effect on the gun debate in America.

Some historians insist that the Second Amendment was not designed to guarantee an individual right to have guns for self-defense. If that's right—and I have my doubts—the Court should be commended, not criticized, for departing from original meaning. Whatever the Second Amendment meant two centuries ago, the right to keep and bear arms has evolved in the public consciousness and in the law. For well over a hundred years, Americans have understood the right to keep and bear arms in personal terms, as a guarantee of their ability to protect themselves from violent attack.<sup>53</sup> Despite heated disagreement over the proper way to interpret the Constitution, our Constitution does in fact evolve. One simply cannot link the vast majority of constitutional doctrines to original understanding. Like all of our worthwhile rights, the right to keep and bear arms has changed over time. Today, forty-three of the fifty state constitutions provide for the individual right to keep and bear arms unrelated to militia service<sup>54</sup>—by far one of the best expressions of the constitutional commitments of We the People. The living Constitution strongly supports the *Heller* majority's recognition of an individual right to keep and bear arms.

Perhaps, nonetheless, the Court should have stayed out of the Second Amendment thicket and allowed the political process to work through the gun controversies without judicial involvement. Such an approach, however, would not have been particularly promising from a public policy perspective. Although constitutional scholars have bemoaned for forty years how the Supreme Court's decision in *Roe v. Wade* supposedly prevented Americans from coming to a moderate consensus on abortion rights,<sup>55</sup> the experience with the Second Amendment suggests that judicial abstention does not inevitably lead to political consensus. For seventy years, the Court remained on the sidelines of the gun debate and the result was anything but a gradual move toward a moderate middle. Instead, the Court's absence has allowed the forces of political unreason to command the field. Thanks

to their power over the gun rights debate, we are left the usual bad public policy that comes from inflamed rhetoric and unwillingness to compromise.

*Heller* offers the opportunity to restore some measure of sanity to the gun debate, thanks in no small part to the contradictions in the decision. If the Court had found an individual right to keep and bear arms but refused to carve out a list of exceptions, then federal courts today might be striking down all sorts of legitimate and effective gun control laws. The exceptions, however poorly justified in the opinion, have provided lower courts with at least some of the guidance that the Supreme Court is institutionally charged with giving. They have also prevented lower courts from throwing into disarray the gun control regimes of the fifty states and the federal government.

By recognizing an individual right and also a variety of permissible limits, the Court also denied victory to both extremes in the gun debate. *Heller* stands as a symbol of a truly reasonable right to keep and bear arms. There is a right, but it can and should be subject to regulation.

One clear limit to gun control imposed by the *Heller* Court is that complete disarmament is unconstitutional. The obsession of both gun lovers and gun haters, disarmament has been a major distraction to the gun debate. Gun rights extremists believe any gun control is a step toward inevitable gun confiscation, while anti-gun hardliners secretly, and sometimes openly, aspire to eliminate all privately owned guns. In truth, total disarmament has never been a serious possibility. There is no political will for such an effort. And even if there were, the folly of disarmament is illustrated by the approximately 280 million guns in America and the fact that many, if not most gun owners would never comply with a law requiring them to turn in their guns. We have tried in the past to get rid of small, easy-to-conceal things that people feel passionately about, like alcohol and drugs, with little success. Gun confiscation would likely do no more than what Prohibition and the Controlled Substances Act did: create a vibrant black market, strain law enforcement resources, and turn otherwise law-abiding citizens into criminals. Guns, like drugs and booze, are here to stay. *Heller* is going to help us get used to that fact.

With disarmament off the table, gun rights absolutists may no longer be able to rally the troops to oppose each and every gun law as a step toward inevitable confiscation. Shortly after *Heller* was decided, the Brady Campaign's Dennis Henigan argued, "By erecting a constitutional barrier to a broad gun ban, the *Heller* ruling may have flattened the gun lobby's 'slippery slope,' making it harder for the NRA to use fear tactics to motivate gun owners to give their time, money and votes in opposing sensible gun laws and the candidates who support those laws."<sup>56</sup> This sanguine view is held not only by hopeful gun control advocates. Pro-gun libertarian Jacob Sullum has written that judicial recognition of the individual right to bear arms would put "wholesale disarmament . . . out of the question"—"a development

that could help calm the often vociferous conflict over gun policy.<sup>57</sup> Prior to *Heller*, Glenn Harlan Reynolds, a conservative law professor and gun rights proponent, predicted, “If the Supreme Court were to interpret the Second Amendment” to protect an individual right, “gun owners would have less reason to fear creeping confiscation, and sensible gun control laws—those aimed at disarming criminals, not ordinary citizens—would pass much more easily.”<sup>58</sup>

Nearly fifty years ago, political scientist Robert G. McCloskey argued that for all the fire surrounding judicial activism, the Supreme Court tends to stay within the broad mainstream of American public opinion.<sup>59</sup> On occasion the Court pushes society a bit more in one direction than the views of the day might support, as in *Brown v. Board of Education*.<sup>60</sup> And on occasion the Court is a bit behind the times, as when it erected barriers to Franklin D. Roosevelt’s New Deal. Yet, political institutions and social forces check the courts and keep constitutional doctrine close to the political center.

The political center on guns is pretty much where *Heller* landed. The Court held that the Second Amendment protects an individual right to keep and bear arms and rejected the militia-only view. Polls consistently show that three in four Americans believe the Constitution guarantees an individual right to keep and bear arms.<sup>61</sup> The Court struck down a relatively draconian Washington, D.C. law that barred all handguns, required that all other firearms be maintained locked or disassembled, and effectively made illegal the use of a firearm in self-defense. According to a 2001 study by the National Opinion Research Center, only 11 percent of Americans support a ban on handguns<sup>62</sup>—a less extreme law than the D.C. gun ban. *Heller*’s list of exceptions has raised the ire of hard-line gun advocates, but those exceptions are also well aligned with popular sentiment. The 2001 National Opinion Research Center study surveyed polling data and concluded, “Large majorities back most general measures for controlling guns, policies to increase gun safety, laws to restrict criminals from acquiring firearms, and measures to enforce gun laws and punish offenders.”<sup>63</sup> One need not believe that the Court should slavishly follow polling results—it shouldn’t—to acknowledge that such a mainstream approach makes the decision much more likely to command public respect. Sticking to the middle makes the Court’s interpretation likely to endure.

There is one final paradox of *Heller*. For a landmark ruling with a revolutionary new reading of the Second Amendment, almost nothing has changed. The D.C. law has been invalidated, but it never really disarmed the citizens of the District anyway and was rarely enforced against law-abiding citizens. A few additional extreme laws will be invalidated under the reinvigorated Second Amendment, but these, like the D.C. law in *Heller*, are likely to be outliers. For all the passion that has been devoted to the debate over the meaning of the Second Amendment, the practical matter of what laws are and are not permissible under that provision remain more or less the

same. In short, the meaning of the Second Amendment has changed a lot, but its impact on gun control has not.

The militia theory of the Second Amendment is dead. Long live gun control. Somewhere, the ghost of Joseph Heller is smiling.



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1. JOSEPH HELLER, *CATCH-22* (11th prtg. 1961).
2. 128 S. Ct. 2783 (2008).
3. Cf. Linda Greenhouse, 3 *Defining Opinions*, N.Y. TIMES, July 13, 2008, Week in Review, at 4; J. Harvie Wilkinson, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Eric Posner, *Will Heller Implode?*, SLATE, June 29, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/06/29/will-heller-implode.aspx>. These sources refer to the possibility that *Heller* is a triumph of originalism, in those terms, without hailing the decision. For hailing on these grounds (without using that phrase), see Debra Cassens Weiss, *Second Amendment Ruling is Justice Scalia's Originalism "Legacy,"* A.B.A. J., June 27, 2008, available at [http://abajournal.com/news/second\\_amendment\\_ruling\\_is\\_justice\\_scalias\\_originalism\\_legacy](http://abajournal.com/news/second_amendment_ruling_is_justice_scalias_originalism_legacy).
4. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789–812 (2008).
5. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (arguing for originalism).
6. See *id.* at 854–55, 863–64.
7. Greenhouse, *supra* note 3.
8. Elaine McArdle, *In Inaugural Vaughan Lecture, Scalia Defends the "Methodology of Originalism,"* SPOTLIGHT HARV. L. SCH., Oct. 3, 2008, <http://www.law.harvard.edu/news/spotlight/constitutional-law/scalia-vaughan-lecture.html>.
9. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817–18 (2008) (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).
10. *Id.* at 2818.
11. See *id.* at 2815–17.
12. Under the National Firearms Act of 1934, machine guns can only be lawfully owned by civilians with specific authorization from government. See National Firearms Act of 1934, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872 (2000)).
13. *Heller*, 128 S. Ct. at 2816–17.
14. HELLER, *supra* note 1, at 398.
15. *Id.*
16. Some of these forms of gun control were described in Justice Stephen Breyer's dissent. See *Heller*, 128 S. Ct. at 2848–50 (Breyer, J., dissenting). For a more comprehensive treatment, see SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* 26–30 (2006).
17. See, e.g., § 9, 1776 Mass. Acts at 18; 1778 N.Y. Laws at 66; 1784 S.C. Acts at 68.
18. See, e.g., § 9, 1776 Mass. Acts at 18 (requiring “an exact List of [each man in the] Company, and of each Man's Equipments”).
19. See Robert H. Churchill, *Gun Ownership in Early America: A Survey of Manuscript Militia*

*Returns*, 60 WM. & MARY Q. 615, 620 (2003) [hereinafter Churchill, *Gun Ownership*]; Robert H. Churchill, *Gun Regulation, the Police Power and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 161 (2007) [hereinafter Churchill, *Gun Regulation*].

20. See, e.g., Act of June 26, 1792, ch. 10, 1792 Mass. Acts 208 (addressing the carting and transporting of gunpowder in Boston); Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218 (prohibiting the storage of firearms loaded with gunpowder in dwellings and other buildings in Boston); Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627 (concerning the storage of gunpowder).

21. CORNELL, *supra* note 16, at 28–29.

22. Churchill, *Gun Regulation*, *supra* note 19, at 157–60.

23. CORNELL, *supra* note 16, at 28.

24. U.S. CONST., amend. II.

25. Nor are any of the laws on Scalia’s list of exceptions defensible as unbroken traditions that reflect the original understanding. Some originalists, including Justice Scalia, argue that courts should defer to “constant and unbroken national traditions” that reflect the original meaning. See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). But none of these exceptions originated in the Founding era or even in the immediate post-Revolutionary period. They are instead products of the popular understanding of the right to keep and bear arms as it evolved in the twentieth century.

26. Scholars have argued that felons were not part of “the people” mentioned in the Second Amendment. See Don B. Kates Jr., *Gun Rights for Felons?*, N.Y. POST, July 22, 2008, available at [http://www.nypost.com/seven/07222008/postopinion/opedcolumnists/gun\\_rights\\_for\\_felons\\_\\_120908.htm](http://www.nypost.com/seven/07222008/postopinion/opedcolumnists/gun_rights_for_felons__120908.htm). *Heller*, however, suggested that “the people” referred to in the Second Amendment should be treated the same as “the people” referred to in the First and Fourth Amendments. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91 (2008). Felons retain their rights under the First and Fourth Amendments, so *Heller* would seem to mean they must retain their rights under the Second Amendment too. That’s not to say that felons shouldn’t be disarmed. They should be. Like all rights, the Second Amendment right can be limited when government has sufficiently good public policy reasons to do so—although this is a reason *Heller* rejects. See *infra* text accompanying notes 51–52.

27. While states passed their own restrictions on felons possessing firearms during this era, the federal government effectively banned felons from purchasing firearms through the Federal Firearms Act of 1938. See Federal Firearms Act (Copeland Firearms Act), ch. 850, 52 Stat. 1252 (1938) (codified as amended at 18 U.S.C. § 921-31 (2005)) (repealed 1968).

28. *Heller*, 128 S. Ct. at 2816–17.

29. *Id.* at 2823 (Stevens, J., dissenting).

30. HELLER, *supra* note 1, at 356.

31. *Id.* at 398.

32. See, e.g., *Holter v. United States*, No. 2:08-CV-100, 2008 WL 5100846 (D. N.D. Dec. 1, 2008); *United States v. Miller*, No. CR 108-112, 2008 WL 5170440 (S.D. Ga. Dec. 9, 2008).

33. *See, e.g.*, United States v. Yancey, No. 08-CR-103-BBC, 2008 WL 4534201 (W.D. Wis. Oct. 3, 2008).
34. *See, e.g.*, United States v. Boffil-Rivera, No. 08-20437-CR-GRAHAM/TORRES, 2008 U.S. Dist. LEXIS 84633 (S.D. Fla. Aug. 12, 2008).
35. *See, e.g.*, United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008).
36. *See, e.g.*, United States v. Artez, 290 Fed. App'x 203, 208 (10th Cir. 2008).
37. *See, e.g.*, United States v. Fincher, 538 F.3d 868, 873–74 (8th Cir. 2008); Hamblen v. United States, No. 3:08-1034, 2008 WL 5136586, at \*3–4 (M.D. Tenn. Dec. 5, 2008).
38. *See, e.g.*, United States v. Garnett, No. 05-CR-20002-3, 2008 WL 2796098, at \*4 (E.D. Mich. July 18, 2008) (finding that *District of Columbia v. Heller* does not “cast doubt on the constitutionality of federal regulations over . . . machineguns and silencers”).
39. *See, e.g.*, United States v. Walters, No. 2008-31, 2008 WL 2740398 (D. V.I. July 15, 2008).
40. *See, e.g.*, United States v. Dorosan, No. 08-042, 2008 WL 2622996 (E.D. La. June 30, 2008).
41. *See, e.g.*, United States v. Hall, No. 2:08-00006, 2008 WL 3097558 (S.D. W. Va. Aug. 4, 2008).
42. *See, e.g.*, United States v. Perkins, No. 4:08CR 3064, 2008 WL 4372821 (D. Neb. Sept. 23, 2008).
43. *See, e.g.*, United States v. Heredia-Mendoza, No. CR08-5125BHS, 2008 WL 4951051 (W.D. Wash. Nov. 18, 2008).
44. *See, e.g.*, District of Columbia v. Lewis, No. 2007 CDC 15745, 2008 WL 4961591 (D. D.C. Nov. 17, 2008).
45. *See, e.g.*, Mullenix v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, No. 5:07-CV-154-D, 2008 WL 2620175, at \*5 (E.D. N.C. July 2, 2008).
46. *See, e.g.*, United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008).
47. 18 U.S.C. § 922(g)(9) (2005).
48. District of Columbia v. Heller, 128 S. Ct. 2783, 2797–2804 (2008).
49. *Id.* at 2817–18.
50. *See* CAL. PENAL CODE § 12071(b)(3)(A).
51. District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008).
52. *Id.*
53. For a historical assessment of the transformation of popular understandings of the Second Amendment from a militia-based right to one based on personal self-defense, see generally CORNELL, *supra* note 16.
54. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686 (2007).
55. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 48 (1987); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1208 (1992); Jeffrey Rosen, *Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID* 170 (2005). For a persuasive contrary view, see David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 840–41 (1999).

56. Dennis A. Henigan, *The Heller Paradox: A Response to Robert Levy*, CATO UNBOUND, July 16, 2008, <http://www.cato-unbound.org/2008/07/16/dennis-henigan/the-heller-paradox-a-response-to-robert-levy/>.
57. Jacob Sullum, *Second Sight*, REASONONLINE, Oct. 23, 2001, <http://www.reason.com/news/show/35880.html>.
58. Glenn Harlan Reynolds, Letter to the Editor, REASON, June 1996, at 10, *available at* <http://www.reason.com/news/show/29954.html>.
59. *See* ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT 14 (4th ed. 2005).
60. 347 U.S. 483 (1954).
61. *See* Jon S. Vernick et al., *Public Opinion Polling on Gun Policy*, 12 HEALTH AFF. 198, 204–05 (1993) (reviewing public opinion polls).
62. *See* TOM W. SMITH, 2001 NATIONAL GUN POLICY SURVEY OF THE NATIONAL OPINION RESEARCH CENTER 34 (2001), *available at* <http://www.mindchanging.com/politics/guncontrolsurvey.pdf>. Some studies find somewhat greater support for a handgun ban, although the position consistently has less than majority support. *See* Vernick et al., *supra* note 61, at 206.
63. *See* SMITH, *supra* note 62, at 2; *accord* Vernick et al., *supra* note 61, at 201–05.